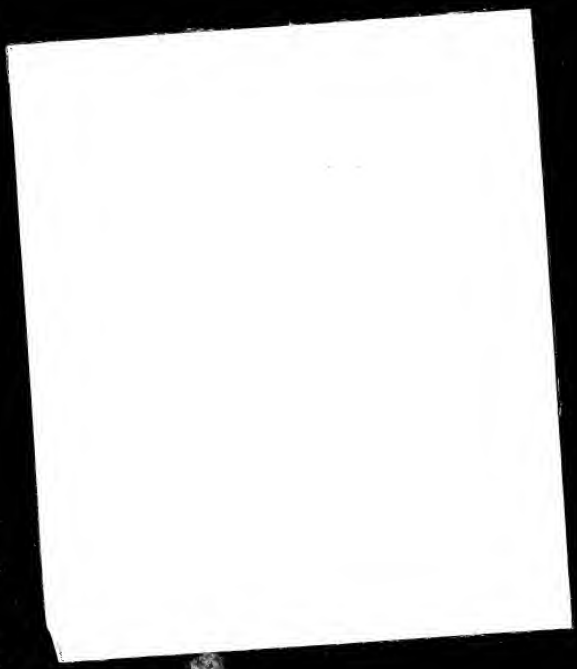

THE HISTORY

OF THE

ENGLISH CONSTITUTION.

BY

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TRANSLATED BY

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AUTHOR'S PREFACE.

The History of the Constitution of England has hitherto only been written with regard to the Middle Ages, and separate centuries since the Reformation. In venturing to draw a picture of the thousand years' Constitutional History of such a nation, I must necessarily begin with an apology in order to explain the shortcomings and inequalities of my work, and in some measure to justify them in the eyes of the benevolent reader.

My writings upon the English Constitution did not originate in a uniform scientific plan; my Roman law professorship offered few points of connection with this subject, although I am much indebted, in these writings, to the works upon the history of Law of my revered teacher, von Savigny. It was rather the efforts for reform in the German legal procedure which gave rise to these essays. Brought up in the laborious and strict school of Prussian Judges, at a time when the whole task of formulating the matter in litigation was entailed upon the judge who personally directed the pleadings of the parties, and having acquired a personal knowledge of the political and social state of Germany, England, and France, I had become sufficiently intimate with the advantages of our nation of officials, as well as with the weak points of our system, both in legal procedure and

administration. I felt most keenly the necessity of the fundamental reforms in this department, which I have for many years advocated in my academical lectures, at a time when the majority of my colleagues stood aloof from, and were opposed to, the reforms that have since been introduced. It was precisely the differences in opinion upon this subject which gradually led me to the conviction, that the so-called philosophical schemes in public law chiefly originate in a lack of positive knowledge of circumstances. My own work on "Trial by Jury" (Berlin, 1849) bears witness to the truth of this statement.

It was the period of storm and stress in 1848 that first led me from the domain of law to the wider one of politics. A closer acquaintance with the condition of affairs in France and England, more especially with the excellent treatises of Lorenz Stein on those of the latter country, made me somewhat reserved and doubtful in my attitude towards the new constitutional development. I declined a summons to the National Assemblies of that time, and preferred to take part in the administration of a great provincial system, which gave to my political ideas a more practical direction, corresponding to the experience that the ruling class in England gains every day in its provincial activity.

The constitutional struggles in Prussia soon took the shape of a decisive conflict between the old and the new form of society; a dispute which was to be finally settled in Prussia for the whole of Germany. I was led by this struggle to examine with greater care into the real origin of the social relations of the various classes in Central Europe, in order to illustrate the rights and wrongs of Feudalism and Democracy by the position of classes in England ("Adel und Ritterschaft in England," 2nd edition, 1853). The recognition this work obtained in many circles encouraged me to further labour.

Meanwhile the ministerial government in Prussia had

proceeded in a direction which might well be considered a realization of the theories of Constitutional Government which had prevailed up to that time; but its effect in Prussia was sufficient to demonstrate how utterly inapplicable to Germany were the French and Belgian models. When this confusion was at the worst, between 1853 and 1856, I began my investigations in the domain of English Administrative Law, the most difficult of the whole series of the labours, and one that I might well compare to a walk through a primæval forest. With good, though incomplete sources of reference at hand, I succeeded in tracing amongst the chaos of disconnected antiquarian matter piled up around Blackstone's Commentaries, a connected system of laws reaching back into the Middle Ages, while Parliamentary papers enabled me to produce as realistic a picture as possible of the administration of to-day ("Geschichte und heutige Gestalt der Ämter in England," 1857). This tract was written not merely in reference to the Prussian abuses of administration, but was intended to draw attention to just what the constitutional theories had forgotten in their long struggle for a suitable popular representation, viz. that building up of a fair administration from the lowest foundation, which is a necessary element in a popular state. This work has not been without its influence upon Germany in filling up a material gap, and, if I am not mistaken, it has in England also influenced some later views of Constitutional History.

Being dissatisfied with this partial view of the subject, and having obtained a more complete body of material upon which to work, I ventured upon the task of writing a history of the English Parliament. But the task of developing the system of English polity in its true aspect, led to my intended History of Parliament becoming a detailed history of the English administrative law ("Englisches Verwaltungsrecht," 2nd ed., 1867, vol. i., Historical pt., 648 pages).

Meanwhile, in the year 1858, constitutional monarchy was restored as the form of government in Prussia, with the honest endeavour to return to an administration according to the law, and to proceed with the construction of the inner fabric of the State. Together with many of my political friends I hoped that the time had arrived for "opposing positive tendencies to the negative tendency of our national policy, for exchanging vague and formless efforts for fixed and settled aims and objects to be gained by attainable means." With regard to the reorganization itself, every one was satisfied that a system of "self-government" was a necessity; but each of the two political parties in the realm, and the body of State officials, respectively understood by this term three very different and wholly incompatible systems. It was the natural consequence of a state of affairs, in which the official world and two distinct orders of society had been involved for a whole generation in a dispute concerning the constitution. It was no easy matter gradually to reconcile prevailing ideas to the truth, that in a modern state, parishes and district unions can no longer be autonomous bodies, but are, primarily, only the executive organs of our more fully developed administrative law, and that local rates cannot be severed from our system of political economy. Hence a legislation that would rise above all party views was seen to be a vital necessity; just as in England the inner fabric of the constitution was not the outcome of parliamentary legislation, but proceeded in its day from the organic laws dictated by the Privy Council. In order to further these legislative labours, or at least to prevent an overhasty imitation of the French model, in the regulation of parishes and districts, there appeared a work which I had somewhat speedily completed, entitled "Die Englische Communal-Verfassung oder das System des Self-government" (1860). Soon afterwards I was able to rewrite with greater care my history of "self-

government" ("Engl. Communal-Verfassung," 2nd ed., 1863), and to give a description of the modern English municipal reforms down to the times when the organic legislation in Prussia really began its work ("Engl. Communal-Verfassung," 3rd ed., 1871).

After the Prussian and with it the German constitutional question had been successfully solved, the time for actual construction had arrived, viz. the time for positive reforms of our administrative system, especially our police laws, local jurisdiction, local taxation, municipal regulations, etc. ("Verwaltung, Justiz, Rechtsweg," etc., Berlin, 1869.) For Prussia I made the principal basis of my work the reformed administrative and social legislation of Stein and Hardenberg, the municipal regulations of 1808, and the existing parochial system in country and town. But whilst I carefully avoided transferring into our German institutions any name or institution from English life, yet in all cases where our officials had no practical experiences at hand to guide them in new combinations in administrative law or local government, I made use of parallels taken from England. In subsequent years there followed essays which dealt with our constitutional disputes, and with the question of reform in our legal procedure, as well as in our administration; among which the legislative proposals touching the Prussian Kreisordnung, school board administration, provincial taxation, the principle of legality in the administrative (Rechts-staat), the reform of the legal profession, of the magistracies, of penal procedure, etc., repeatedly brought me better points of view of and parallels with the English law.

Thus there gradually arose, in addition to a continuous history of administrative law and "self-government," a chain of parallels for various points of the inner life of the state, in which, thanks to the energetic development of the royal prerogatives, the English and Prussian constitutions are much more intimately related than is generally supposed.

It cannot be denied that these writings appeared in an epoch and in the midst of the most profound political crisis in my native land (during the last years of Frederick William III., under Frederick William IV., during the regency, and under William I., Emperor and King); and appeared, too, under the pressure imposed upon me by my academical duties, as well as that entailed by a magistracy and a provincial office, and by a long and active parliamentary life. Though all this has probably been instrumental in producing a many-sided appreciation of affairs, it necessarily had an unfavourable effect upon the systematic arrangement of those writings; besides which, in a work directed towards an immediate and practical end, the connection of the whole cannot always be sufficiently kept in view and expressed. Hence arose on my part a natural desire to put together the English constitutional history in a larger and more coherent form, using as a basis the work most nearly complete in itself, the history of English administrative law, from which I could retain the divisions into periods and chapters because it was originally designed for a history of parliamentary law. As regards this portion, the present work appears as a third edition. And here I have repeated an old experience gained on the German judicial bench, namely, that where, after many interlocutory judgments, the final judgment has been reached in any litigated case, many mistakes, one-sided views, and gaps are discovered, which have arisen in determining the separate preliminary and intermediate questions. Fortunately such interlocutory judgments are not binding on the historian, but allow of the completion, correction, and modification of opinions which once went too far; and in this I have been much helped of late years by the excellent historical works of Froude, Freeman, Stubbs, and others.

In another direction this history has encountered a grave difficulty, viz. in the copiousness of the matter.

A constitutional history must portray the reciprocal action continually going on between State and society, Church and State, constitution and administration, state-life and popular life, political and private economy, between the greatest and smallest interests. These are ever acting and reacting one upon another in such wondrous complications that a picture of the coherent elements, even when the moments of their activity are continually brought before the reader, can be but inadequately represented. In this constitutional history differs from a history of law, for the latter traces the development of the dogmas of private and criminal law, by quoting from legal documents and authorities, whilst the former deals with the living body of the State in its origin, its life and its progress, and the successive and unbroken evolution of enactments which have remained in force until the present day.

But even in this imperfect form, the English constitutional history is pre-eminently suited to give a picture of the inner coherence of the various members of the state and society, on which the history of all constitutions and the fate of all nations is really based. In these reciprocal relations the history of former centuries returns to life, and becomes a mirror wherein are reflected the struggles of the present; but above all it must be regarded as manifesting the over-ruling Providence which guides the destinies of mankind according to right and towards the right. Every man who, with the inevitable partiality arising from a political, ecclesiastical or social standpoint, follows up the development of the British empire for a thousand years back, and strives in all earnestness to discover the connection of events, will be obliged to correct or amplify many preconceived opinions. The results of personal activity and experience are similar in the manifold relations of public life, in narrower and in wider circles; and it is just this habit of personal activity that has educated the English nation and its ruling class in political freedom,

and has raised the political parties in the country to the capacity of ruling parties. Perhaps in later treatises I may succeed in portraying these reciprocal relations in a still simpler and more vivid manner, for in them lies the solution of that enigma of the European world—otherwise incapable of explanation—namely, how it comes that in one country the individual members of the State and of society appear to be in a state of progress, and yet the whole loses ground, whilst in another, the individual elements appear to be backward and at times to retrograde, whilst the whole is mightily advancing.

BERLIN, *April*, 1882.

TRANSLATOR'S PREFACE.

THE author's world-wide reputation, both as a jurist and historian, was alone sufficient to justify the appearance of an English edition of his History of the English Constitution; but the preface to the German original furnishes a still more cogent reason for presenting this translation to the English public. The author there tells us that no consecutive history of the English Constitution has previously been written. Various epochs have, it is true, been treated by consummate masters, but there is no treatise extant, that has attempted in any way to describe the rise of our political system, and to follow it through all its varying phases down to the present.

It is the author's express wish that his preface to the German original, though primarily intended for German readers only, should likewise preface this translation; as therein are set out the causes that induced him to commence and bring his researches to a successful issue.

The work having been compiled fragmentarily and at different times, and having originally been devised to meet the practical needs of the German legislature, could not but exhibit some abnormal features; among them the especial stress laid upon the administrative institutions of the State,

the county and the parish. The author was, moreover, obliged to express himself according to political and legal conceptions familiar to German jurists, and which diverge more or less widely from English terms. Hence a free translation of the English terms into German had first to be made, a retranslation of which into English is far from easy, and in many cases might appear to call for explanation, the insertion of which, however, would have encumbered the text.

The author as well as the translator must accordingly beg the indulgence of the reader for any roughness or unevenness of style, which may blemish the original or the translation; shortcomings that could scarcely be avoided, as the author could only hastily revise the sheets.

At all events it will be of the greatest interest for English students of history to see how a foreign jurist, who has been much engaged with the reform of the judicial and administrative institutions of Germany, treats the ancient and modern development of the "Parliamentary Model State."

P. A. A.

London, *November*, 1885.

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FIRST PERIOD.

THE ANGLO-SAXONS.

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The conquest of the British Isles by the Saxons, Angles, and Jutes from the middle of the fifth century has the character

* With regard to the sources of this period, Lappenberg ("Geschichte Englands," vol. i. Introd.) gives the most exhaustive information. Compare also Gneist ("Geschichte der Communal-Verf." pp. 7–9). The laws in the following pages are quoted as given by Reinhold Schmid ("Die Gesetze der Angel-Sachsen," 2nd ed., 1858). Where special occasion demands, quotations are given from the official report of the Record Commission (Thorpe, "Ancient Laws and Institutes of England," two vols. 8vo. 1840). The several royal laws are quoted with the abbreviations used by Schmid, viz. Athlb. (Æthelberht), Whtr. (Wihtraed), In. (Ine), Alfr. (Ælfred), Edw. (Eadward the Elder), Athlst. (Æthelstan), Edm. (Eadmund), Edg. (Eadgar), Athlr. (Æthelred), Cn. (Cnut). From the Norman times the *Leges Gulielmi Conqu.* also contain in the main only a collection of Anglo-Saxon rules of law. The so-called *Leges Henrici I.* are principally also only a private compilation from the later

of a gradually advancing occupation. The disunited Britons, some of them grown effeminate, while others have become savage, are overcome after numerous battles with varying issue; the civic settlements, dating from the days of the Roman sway, fall into ruins; the old Roman culture disappears, and with it Christianity; the aboriginal population is either driven into the hills or reduced by oppression to a state of slavery or to the position of impoverished peasants. Hence in England those peculiar conditions are wanting which in Western Europe arose from a mixture of the Germanic races with a Romanized provincial population, with Roman culture, and with the Roman provincial and ecclesiastical constitution. On the other hand, the conquest had the effect of destroying the tribal bond that still prevailed in the home from which the conquerors came. The first settlements, indeed, appear to have been based upon the exodus of small tribes (notably the Angli), with wives, children, and servants, from the old home into the new. As colonization slowly proceeded new migrations continually took place (as in the colonization of the Marks in East Germany), in consequence of which the old tribes became mingled together, and the original family unions were widened by new settlers. The groups of conquerors thus welded together appear to have found their bond

Anglo-Saxon legislation, dating from the middle of the twelfth century. The *Leges Eduardi Confessoris* also are a private compilation from various sources and traditions from the legislation of the later Anglo-Saxon times, and apparently dating also from the twelfth century. The Anglo-Saxon documents are quoted from Kemble's Codex Dipl., vols. i.–vi. (1839–1846). Of English historical works bearing on these times use has been made principally of Kemble, "The Anglo-Saxons in England" (1849), two vols. (translated by Brandis, from whom the quotations are taken); Sir Francis Palgrave, "The English Commonwealth" (1831, 1832), two vols.; Sharon Turner, "History of the Anglo-Saxons" (1799–1835), three vols. with the supplementary volume, "The History of the Manners, Landed Property," etc. New and important contributions for this period are also given by Freeman, "History of the Norman Conquest," vols. i., ii., iii. (2nd edition, 1870); Bishop Stubbs, "Constitutional History," vol. i. cap. 1–8 (1874); and an exceedingly able and useful selection of legal charters and historical documentary evidence is furnished by his "Select Charters and Illustrations of Constitutional History" (2nd edition, Oxford, 1874). Of German treatises, a history of Anglo-Saxon law containing the principal features, by Conrad Maurer, "Münchener Kritische Ueberschau," vol. i. p. 47, ff., continued in vols. ii. and iii.; Phillips, "Geschichte des Angelsächsischen Rechts" (1825); Lappenberg, "Geschichte Englands," vol. i. (1838).

of union principally in the greater and lesser military chiefs, from whose office as leaders in war the royal dignity arose in later times.

After the occupation of the country a division of lands took place, in which the *hîda, familia, mansus,* or plough of land (which, according to Kemble, amounted to thirty-three Saxon, or forty Norman, acres), was made the unit or smallest measure of land settlement, and, with certain rights of pasturage and woodcutting, was regarded as a sufficient basis for a peasant's household.

In many places the British population had already a distinct landed property upon which the conquerors entered. In later times the continual feuds among the petty kingdoms everywhere hastened the dissolution of the family bond and the development of private property, with all its lasting effects upon the constitution and civilization of nations. Only in a few tracts of land in North Europe were soil and climate so inviting and so productive for the peaceful labour of tillage and pasturage, so calculated to produce attachment to hearth and home. From the beginning of the tenth century the expressions "bôc-land" and "folk-land" appear as the invariable equivalent of the *ager privatus* and the *ager publicus*. The rich store of Anglo-Saxon records proves conclusively that the rights of private property were early established, and that property could be transferred by title deeds. Just as certainly was there in early times great inequality in the division of property. The reason for this is chiefly to be sought in the existence of small armies which were slowly but steadily conquering, under their numerous captains and commanders, who at the division of the land received the greater possessions, which possessions in process of time were managed by the settlement upon them of smaller people, who rendered payment in kind. This inequality of property had already undermined the old position of the freeman. The ancient inheritance of freedom, the considerable weregeld, and the personal protection accorded the *liber homo*, were, indeed, continued to him, even when he possessed no land, down to

the close of the Anglo-Saxon period. But in every other respect, the rising up of the greater landed proprietors over the class of the peasant proprietors, and the degradation below the line of freedom of the free-born men, without possession of their own, is increasingly manifest. The conditions of property among the Anglo-Saxons tended thus to a state of dependence, by means of loans of land and service, on the largest scale. The ordinary names for those who were in this state—*Folgan*, *Hlâfäta*—include both the settlers upon the land thus lent or let and also the personal domestic servants. But the state of service (*gesith*) thus created proceeds in two widely divergent directions.

This entrance into the sphere of personal service has quite a different meaning as applied to the household of the inferior warrior chieftains. When once a settlement has been formed, the honour attached to this service, and its connection with military and legal affairs, gives the retinue of the king a position so prominent as to be eagerly sought after by the landless sons of the great proprietors, and even by free landlords. The relation of service to the king forms more and more an especially honoured upper class, increasing with the growth of the royal privileges and of the realm.

On the other hand, this dependence, brought about by the settlement on farms held of private persons, is productive of a lower position, which sinks below the level of the old common liberty. This class of settlers are for the most part small farmers, intermingled even with bondsmen, and it has the position of a dependent and heavily burdened peasantry. Extant records show us how manifold were the ways of granting such a "fief," whether revocably or irrevocably, for years or for life, and with reservation of numerous payments (*gafol*) in kind or in money, in labour, service in the field, defined or undefined. The great landed proprietorships realized much from such settlements, and supplied themselves with the natural products and the services of which a great household stood in need, for the wants of private life as well as for the equipment of the troops. The depen-

dence thus created became in fact hereditary, and increased in times of war, through the destruction of the free peasant farms, and in times of peace through the increase in the number of the landless members of families. In this direction social order appears in the Anglo-Saxon times to have advanced with even step. The law of property originating in later times under the name "*rectitudines singularum personarum*," affords us in the law affecting the Thane, in the rights of inheritance, and of those affecting the farm labourers, a picture of a firmly established state of society, exhibiting a deeply rooted dependence of the free-born classes on great landed proprietorships.** In its forms of armament, administration of justice, and Church, the State is constantly acting and reacting upon these bases of property. Army, Law Court, and Church remain throughout the whole of the Middle Ages the three foundations on which the commonwealth is carrying out its work of change.

I. The first department, **the Military System** of the Anglo-Saxons, is based upon universal service. Under this is to be understood the duty of every freeman to respond in person to the summons to arms, to equip himself at his own expense, and to support himself at his own expense during the campaign. The impossibility of attaining a uniform fulfilment of this duty is at the root of all the changes in the social relations, and in the constitution of the Germanic races. After a fixed settlement has been entered on, the small peasant farm, barely sufficient to support a family, cannot possibly, as a rule, answer this duty, and still less can it be fulfilled by the landless freeman. Among the Anglo-Saxons, as elsewhere, after the settlement a division of the militia, according to Hundreds, was organized, in which arrangement a remedy was to be found for existing evils. They were obviated in this way, that the Hundreds, instead of furnishing a hundred

** The laws of property are treated of at length by Conrad Maurer, in the "Münchener Kritische Ueberschau." R. Schmid's "Glossarium" v. Bôcland, Folkland, Hid. Kemble, Anglo-Saxons, i. c. 2, 4, and appendix A, B, C. On the older family constitution, see R. Schmid in "Hermes," vol. 32 (1829), pp. 232–264. On the land communities of the Middle Ages, see Nasse, "Das Englische Marken-system."

men, sent smaller contingents, and that in making the divisions the number of the hides of land was taken into account; that a landowner was allowed to send his sons and his followers to serve in his stead, and that the regulation of the duty of furnishing troops was left to the resolution of the National Assembly, and in process of time to the lieutenants of the king in the County Assembly. The Hundred therefore means, with regard to the constitution of the army, only an equal contingent within a greater unity; and this is the reason that in various epochs, as for instance under the reign of Alfred the Great, a new organization of the Hundreds took place. The Anglo-Saxon times never attained to such fixed and determinate rules of law as were introduced by the capitularies of the Carlovingians. The sub-distribution was left entirely to the administration of the county, whence only a very unequal and faulty form of militia could proceed.

Accordingly, in the times of the Heptarchy, the individual chieftains were obliged to have recourse to other forces for the waging of their numerous wars, by detaining and reorganizing from among their free servants and followers an armed retinue ready to respond to their personal summons. All court offices had originally a warlike character. Prospects of booty, honour, favour, and reward induced even freemen to join such trains of followers. Besides the booty, gifts of folkland and grants of offices of trust were the rewards chiefly paid for services of this description, and thus there was formed round each of these little kings a first levy of tried soldiers, whose existence confined an appeal to the general military service of the people more and more to cases when the country was in peril. We first read in the laws of Ine of these warlike Gesith-men (with or without land of their own), whose increased weregeld indicates them as belonging to a class liable to military service in a higher sense; and in process of development these men become the still more esteemed class of Thanes. Analogous reasons in later times led to the greater landed proprietors in the united Saxon kingdom forming a warlike retinue from among their domestics, their

under-vassals skilled in arms, and in some measure from among the free landed proprietors. At the same time the majority of the freemen were, to a certain extent, practised in arms, but this varied according to the position of the districts. As a rule, the service of the freemen in times of peace was required by the Hundreds more for guard duties, the repair of castles, and the making of roads. The reorganization of the army by Alfred was not permanent, and after the lapse of a hundred years sank into a state of utter weakness, and at the close of the Anglo-Saxon period the ascendancy of a few powerful, warlike Thanes, with their armed followers, produced an oligarchical character in the whole of the constitution. (1)

II. The second department, the **Anglo-Saxon Administration of Justice**, in spite of the numerous accounts handed down to us, affords no comprehensive picture of the whole. In the developed constitution of the tenth century, however, we meet with judicial courts of the two following degrees.

The *Hundred Court* or Hundred-gemôte, meeting once a month for the narrow district of a commonalty (*Vicinetum*), decides the ordinary civil actions and petty criminal cases, and is the principal place for the solemn conclusion of contracts and testamentary dispositions.

The *County Court* Shire-gemôte, meeting twice a year, exercises a fuller criminal jurisdiction, decides quarrels between the inhabitants of different hundreds, draws in general within

(1) An enquiry into the constitution of the army leads to the negative result that there was no legal distribution of the burdens of military service in Anglo-Saxon times. Military service was the personal duty of every free man, and not a fixed burden, but one pertaining to the commonalty, and regulated according to extent of property. The much-vexed question, which has been discussed almost within the memory of the present generation, as to whether in the Anglo-Saxon times a "feudal system" existed, has its origin in mistaking a few unconnected elements for the whole. Grants of land, and the rendering of military service by the grantee, existed already in Anglo-Saxon times, as did also the legal and police jurisdiction of the landlord over his tenants. In the same way there was a bond of allegiance between the king and his higher followers, between every master and servant, between the Hlâford and the Hlâfaeta; but the growing together and the consolidation of these relations into the English feudal system did not take place until the Norman times. For their more special formation under the influence of the monarchic power, see cap. ii. sec. 2.

its jurisdiction matters in dispute between more powerful parties, and forms a periodical district assembly for the conduct of all public business in the county.

The parties appear before the court with numerous compurgators, *i.e.* persons prepared to swear to the truth of a statement; the employment of witnesses in civil actions was tolerably frequent, and suitors seem to have appeared frequently taking a part. A regular participation in such judicial proceedings, with their numerous judges and compurgators, presupposes an independent position which must have been very rare among the small settlers, many of whom possessed but a single hide of land. And yet a regular attendance at judicial proceedings is the necessary preliminary of all legal knowledge; he who is only present now and then cannot become and remain the depository of legal knowledge and of legal custom. Accordingly the great County Courts were, at their first authentic appearance, assemblies of the greater proprietors, who, in their capacity of regularly appearing, experienced lawmen, obtained the appellation of "Witan." A picture of old Germanic peasant communities forming a court in full assembly, under their chosen presidents, is not to be found among the Anglo-Saxon records. The inequality of the proprietorships has thrust back the smaller farmer into the position of a spectator in the large assemblies, and even in the small County Courts the judgment is generally left to a small number of "Witan."

These beginnings of a magisterial constitution are founded upon the natural basis of the ascendancy of the great proprietors. The Carlovingian institution of select lawmen (*goabini*), appointed permanently by a royal officer, is foreign to Anglo-Saxon ideas.

The magisterial office in Anglo-Saxon times is remarkably vigorous in the matter of punishment. Blood vengeance appears only to have been permitted against the slayer with malice aforethought and the adulterer. The privileges and responsibilities of clan and family kinships assume a subordinate position where a breach of the peace has been com-

mitted. The system of composition, so far as payment of weregeld and penalty to the parties is concerned, appears to have soon become only subsidiary. Serious breaches of the peace are generally visited with capital or corporal punishments, while for serious as well as for petty offences, considerable fines under various styles and names were payable to the magistrates. Penal justice was thus, even in the Anglo-Saxon times, in intimate connection with the financial rights of the king, and in course of further development with the privileges attached to the private jurisdiction of the landowners. Out of the magisterial authority in criminal procedure there was formed a system of protective measures to secure the "maintenance of the peace." The householder is made responsible for those living with him, the landowner for all the occupiers of his soil, especially for their due appearance in courts of justice. The landless man who did not belong to the household of an established landed proprietor, was forced to enter a union called a "tithing." Towards the close of the Anglo-Saxon period, this "tithings system" developed into similar small unions consisting both of free men and of poorer people dependent upon the soil. At the same time these formed a police system, and acquired a right of settlement, and thus incorporated the landless population either with the household of a Thane, or with the land belonging to a Thane, and to a community dependent upon him, or forced them into a tithing of free peasantry. (2)

III. The third division of the Anglo-Saxon life is furnished by the Christian Church—the necessary complement to the army and the judicial system. Just as the influence of the heathen priesthood in the new settlements does not appear to have been anywhere very important, so the conversion of the separate kingdoms to Christianity in the course of a single century (591-688) was effected without any material

(2) As to the legal jurisdiction of Anglo-Saxon times, compare Lappenberg, vol. i. p. 581, *et seq.*; Phillips, pp. 166-210. The description of the offices and the districts (cap. iii. iv.) refers to their various aspects. As to their further development under the influence of monarchy, vide cap. ii., secs. 2 and 3.

struggles or convulsions. The successful labours of the Scottish missionaries, who brought down from the north the faith of the British Church, were met from the times of Gregory the Great and St. Augustine onwards by the equally successful propagation of the Roman Catholic ecclesiastical system advancing from the south. In spite of the disunion that at first existed, Christianity found a fruitful soil in the peaceful inclinations of the new colonists; while the early entrance of the aristocratic classes into the clerical profession is a characteristic feature in England. The importance of the Church of the Middle Ages shows itself primarily in its protection of the weaker classes. The Church created the first beginnings of a legal protection against the sale and ill-usage of women, children, and bondsmen. It was the Church that first secured to the labourer his day of rest, his earnings, and an effectual liberation from slavery. She it was that founded the earliest schools for the upper classes, whilst the lower clergy and the monks were accessible to all alike for advice and instruction. She was the first to foster gentle manners, industrial pursuits, peaceful intercourse, and was the first originator of relief for the poor. The higher regard for the sanctity of marriage, the raising of the position of women—first in manners, and then in their private rights—are due to her influence. In the Law Courts the Church made her power felt by the frequent application of oaths, and by conducting the judicial trials by the ordeal of fire and water, which fell to the Christian clergy in the transition from heathendom. The Bishop appears in conjunction with the Lieutenant of the king, as the head of the county administration. And so the Church, steadily progressing, enters into the Commonwealth to fulfil those humane tasks for which there was as yet no room in the temporal constitutions of the Middle Ages. In all circles of public administration the *Clerici* are the indispensable medium for writing. Bound up with all classes of the population, and with all the interests of life, the development of the English Church, as regards its officials, its doctrines, and dogmas, has been more national in

its character than the Churches of the continent. Nevertheless, the internal organization of the Church is true to its principles, as being an universal school. To perform its widely extended functions, there was formed a peculiar class for intellectual labour, which, like every other free labour, needs property; and therefore in the Middle Ages it needed landed property, without which the Church would have remained in a servile position, and incapable of fulfilling its vocation. The ecclesiastical constitution accordingly assumes in this most national of all Church institutions the same external form as in the rest of Christian Europe. A school for a nation can only be conducted by spiritual superiority, and this demands, on the part of officials, submissiveness and devotion to their profession,—the first example in the Germanic life of a class of professional public functionaries. (3)

Such are the political forces which, continually acting and reacting upon the inequality of property, remodel those class relations to which I shall again revert in Chapter VI. The bearers of arms maintain their dominion over the soil, and become the landowners. The landless freemen come into a lasting and actually heritable dependence upon the land. Throughout all degrees of property there runs a disposition to create dependences which strives after a legal recognition, and gains it in the following way.

(3) We shall revert to the more important of these relations under the head of Ecclesiastical Administration (Chapter V.). As to the outward progress of the conversion, *vide* especially Lappenberg, i. 132–205. The propagation of the new doctrines proceeded from above to below, making its first appearance at the court, and then through resolutions of the national assembly, which was generally appealed to, and which decided by a majority of voices. With regard to the main characteristics of Anglo-Saxon heathendom, see the exhaustive essay of Kemble, i. cap. 12. The effort made to replace as soon as possible the few foreign missionaries by native bishops is worthy of note. "It is owing entirely to the admission of natives among the higher clergy that it became possible for the Church of the Anglo-Saxons to become so soon a national one, that the Liturgy, Ritual, Prayers, and Sermons were so soon given in the German tongue, and found their way to the heart of the people. The retention of the Germanic proper names, the peculiarity of the Anglo-Saxon calendar and its feasts, the small influence exercised by the Roman Ecclesiastical Law, the development of the national language by the Ecclesiastics, the weakened influence of Rome upon the princes of the realm, are the peculiar and intimately connected advantages of a Church, truly richly endowed by reason of its former deficiencies" (Lappenberg, i. 163).

The state of dependence in which the poorer classes were, was formally recognized by the king and the general assembly of the realm and became a principle of law. The relation between Hlâford and Hlâfaeta was already a complete portion of the Anglo-Saxon legislation. (In. 39, 50, Alf. 37, 42; Athlr. i. 1, ii. 4, 7, iii. 5, iv. 1; Edm. iii. 7; Cn. ii. 29, 32, 78, 79.)

Higher services rendered in the militia and in the Law Courts then led to the legal recognition of a higher worth or station—to the idea of Thanehood. The direct expression for the "worth" of a man is the "Weregeld," which was fixed in the proportion of 200 to 1200 shillings; that is, the Thane was estimated at six times the rate of the mere freeman. By multiplication of these, further sums were arrived at for the Ealdorman and the Bishop. As the legal system of these times is primarily based upon the legal protection that a fine affords, a higher rating was equivalent to the recognition of the right to a higher class or rank. Hand in hand with these two relations is developed the foundation of a manorial system. The householder and landlord has the actual power to dismiss his *gesith*, and to take away from his tenants their grants, whence there results a right accorded to the lord of deciding upon the disputes of his *gesith* and his tenants. Recognized by the authority of the State, the domestic *Imperium* becomes a regular jurisdiction. With the increasing power of the magnates, further royal privileges pass to the landlords, and in later times also a petty criminal jurisdiction. Amongst the Thanes, again, certain greater Thanes are distinguished from the others, as having large territories and armed retinues, and being in possession of the high state offices, as well as of the lay dignities of the Ealdormen. These, together with the Prelates, compose, in Anglo-Saxon times, the legislative councils of the realm. Just as the county assembly in its executive capacity had become limited to Thanes and a few minor elements, so a similar limitation in a far higher degree took place in the council of the realm. The Anglo-Saxon

Gemote, the so-called "Witenagemôte," is a representation of the masses of landed proprietors corresponding to the system by which they fulfil the functions of the State; that is, it is determined by property, office, and royal appointment. In the last century of the Anglo-Saxon period the great proprietorships had attained such an ascendancy as to make the position of the throne vary with the period and with the character of its occupier, and the exercise of all royal rights often appears, as a matter of fact, to be the right of the oligarchic Witenagemôte.†

† As to the degrees in the different classes, a more exhaustive account will be found in Chapter VI., I only here refer to what is necessary for the understanding of the offices. In the Laws of Ine the *Gesithcundman* makes himself at first conspicuous. It is only since the time of Ælfred that the dignity of a Thane appears in connection with landed property to the extent of at least five hides, which carries with it a "Weregeld" of 1200 shillings, and the rank of a *Twelfhyndeman*. I conclude from a combination of numerous indications that this is connected with the establishment of altered military arrangements, according to which the king prevailed upon the majority of the great landlords to pledge themselves to him to obey his personal summons; for which the honour of a royal Thane, the appointment to the office of Shir-gerêfa, etc., as well as the further advantages resulting therefrom, such as favours and honours, were a sufficient equivalent. The title of "Thane" now becomes applicable to the royal servants, and extends from the highest offices in the court down to the smaller offices appertaining to the county administration and the royal demesnes. Moreover, those having the right to exercise a private jurisdiction, belong by virtue of this right to the class of Thanes, because their civil and police powers are now regarded as royal offices. The preponderating influence in this arrangement was the regard paid to public office and a public calling, and not to mere amount of property. That this was the leading idea attached to the complex notion of Thanehood is shown by—

1. The etymology of the word, which expresses (together with the word derived from it, *thegnian*, to serve) the *serviens*, or *minister*. This last is the usual translation in the old Saxon records.

2. In later times any kind of official position was so naturally connected with the word "Thane," that loss of Thanehood was used as a synonym for dismissal from a royal office.

3. Even where the possession of five hides is mentioned as being the basis of Thanehood, the reservation is added that the following things are further required: a church and a kitchen, a bell tower, and a seat in the castle gate (which is equivalent to a personal jurisdiction, *saca et soca*), and a special office in the king's hall (of lay rank, cap. iii., Schmidt, 381).

4. That the stipulated service forms the decisive point is further shown by the equality subsisting between all Thanes until the close of the Anglo-Saxon period. The great Thane with princely possessions is a Twelfhyndeman, and is no more than the simple county Thane with five hides of land. The Anglo-Saxon legal phraseology has no special term for distinguishing the great Thanes. When it is necessary to single out the magnates, the denotation "Royal Thanes" is used with a certain emphasis, in order to signify the important royal office they hold.

CHAPTER II.

The Anglo-Saxon Monarchy.

From amidst this reconstruction in the system of property and freedom, we see in England the regal power going forth, —the most magnificent civil creation of the Middle Ages. Among the most nearly related continental races, in their old dwelling-places, among Saxons, Frisians, Holsteiners, Hadlers, and Dittmarshers, we find in those times no regal sovereignty. Its appearance among the Anglo-Saxons must be accounted for, not by national peculiarities, but by social conditions, which arose from the settlements upon conquered territory. Among the first generations, too, we do not as yet find a kingship. The conquering expeditions had certainly a chieftain at their head, who belonged to the families famous in war (*nobiles*); and in the conquered country we find the successful commander at the head of the army which has seized the territory. His name was associated with memories of victory, with the acquisition of the present dwelling-place. When the land was divided the lion's share fell to him, as well as the spoils of the vanquished British chiefs. In like manner, as possessions became hereditary, the transfer of the ducal dignity to the son was looked upon as a natural arrangement. Such a condition of things was found even among the Republican tribes of the continent. Actual kingship begins to exist—firstly, so soon as the dignity of the chieftain appears not only in the leadership of the army, but when it becomes a comprehensive supreme power,

including the office of magistrate, of protector of the peace, of defender of the Church, with the highest control of the Commonwealth in every department; secondly, so soon as this highest dignity has become recognized by the popular idea as the family right of a high-born race. Directly both these conditions co-exist, the new idea shows itself in its new name. After gaining great victories, Ælla, of Sussex (514–519), was the first to adopt the title of "Cyning;" and this example was gradually followed by the other chieftains, down to the petty potentates who ruled over a tract of country hardly as large as a county of the present day. The step which exalted the ducal dignity, until then recognized as a martial title, to the permanent position of supreme power, was, regarded from without, of no great importance. The head of the army in time of war, becomes the head of the government in time of peace; that is, the organization according to which the soldiers assembled under their leader, becomes the model for the new monarchical state.

The social conditions which regulated this new state of affairs have been indicated above. Together with the definite development of private property, the principal military and legal offices are transferred to a class of great landlords, which class in this way gains a predominant influence in the commonwealth. The graduated values of the landed properties gives the upper classes a separate position with regard to "Weregeld" and fines, puts them on a different footing in the army and in the Law Courts, puts a different value upon their oath, and accords them a different share in judicial proceedings. The ever-increasing difficulty of obtaining justice against the powerful, the class interests which pervade army, Law Courts, and the system of the maintenance of the peace (and later also the Church), create an idea that the old confederate constitution is no longer sufficient for the freeman. Under such conditions the chosen officers of the State become, wittingly or unwittingly, the representatives of the interests and the privileges of the upper classes, and develop a tendency to use their power for the exclusion from justice and oppression

of the lower classes. In the burden which military duty imposed upon the small landowners, and in the numerous duties of tenure and service, means for this oppression were ever present, and were increased by manifold circumstances. War and disaster drove the small independent landowners from their farms; the Hundred was broken in upon by the lords of the manor and by dependent communities, and the separate allodial peasants became less and less capable of protecting themselves and bearing the common burden. In such a state of affairs the weaker classes would necessarily be in a better position when a higher impartial power appointed and controlled the civil and military officers. Only by such a power could the initiative be taken for the measures which were now necessary for the protection of the unrepresented classes. The exclusion of the small landowners and of the landless from all the greater assemblies lessens their interest in the life of the confederacy, and inclines the masses to subject themselves to one great distant lord, rather than to numerous powerful neighbours. In this matter the Middle Ages were guided by an empirical tact. If the supreme ruler of the commonwealth was to be exalted above these class interests, it was necessary that his ruling position should be made a permanent dignity in his family, which should be independent of the favour of the dominant classes, and devoted to the lasting welfare of the community; and as a rule the king was inclined to this from the feelings inspired by his high calling. In contrast to the ancient world, in the Germanic world the hereditary kingship raised the "State" above social interests, and gave the permanent and highest duties of the State a permanent representative. And therefore it is that, among the Anglo-Saxons, kingship was upheld by the attachment of the weaker classes, and became bound to the whole community by a mutual bond, which of all the creations of the secular State has endured longest and most firmly.*

* As regards the origin of the Anglo-Saxon kingship, see the clever monograph of Allen, "Inquiry into the rise and growth of the Royal Prerogative in England" (1830), in which the historical dates have been carefully collected. But the appearance of the treatise at the time of the

The honorary prerogatives of the kingly office are next formed in the following way. They resulted from the idea that the embodied authority of the State, if it is to stand above the community, must be itself the undisputed head of the society. Accordingly the king has the highest grade of "Weregeld," viz., in Mercia 30,000 sceatts, equal to 7200 shillings, or 120lbs. silver; as high, therefore, as the "Weregeld" of six Thanes or thirty-six Ceorls. In other districts the simple "Wite" of the king is apparently not higher than that of the archbishop; but the amount of the royal "Weregeld" is doubled by the "Cynebot" of equal amount, which is demanded, not by the family, but by the whole nation for the life of "its king," thus giving expression to the idea that in reciprocal possession the king belongs not merely to his family and his class, but to the whole community and the nation at large. The next-of-kin of the king are also, by the simple "royalwere" and by larger contributions (Cn. ii. 58, Appendix iv.), ranked above the Prelates and Thanes, and form, under the name of "Æthelingi," the only legally recognized hereditary nobility of the Anglo-Saxon period. The early recognized capital punishment for regicide, and for harbouring seditious vassals of the king, belongs pre-eminently to the class of political or magisterial prerogatives. A higher degree of "Weregeld," and a fine for the king's vassal, and the higher position of the vassal as "compurgator," create at once a social prerogative, and a recognition of magisterial authority. An especial protection extends even down to the godchild, the groom, and the man whom the king honours by deigning to drink in his house. To the social side of the kingship belongs finally the formation of a Royal Household,

Reform Bill, and the abstract arguments employed, have caused the author to entirely mistake the authenticated development of a king from social causes. In the background one can perceive in this author the idea of usurpation and a continual dislike of monarchy: everything that is immature and anomalous in the development of kingly power he accordingly places in the foreground. Turner, on the other hand, is unprejudiced, "Anglo-Saxons," Supplement (iv.) p. 262. For the historical facts as to Ælla, of Sussex, *vide* Bæda, "Ecclesiastical History," i. 15; "Saxon Chronicle," anno 449–495; Lappenberg, i. 566. The etymology of the name "King" is dubious.

the four chief offices in which, as in other Germanic kingdoms, are those of the chamberlain, the marshal, the steward, and the cupbearer.**

The rights of sovereignty in the State are more slowly developed than the prerogatives of the king. To designate him as the highest official in the realm, the terms, "Hlâford" and "Mundbora" of the whole nation are used (Chron. Sax. anno 921, and under Eadward the Confessor). Whilst the word "Hlâford" expresses the lordship over the whole nation, which has to swear faith and allegiance to him, the term "Mundbora" expresses a protector and guardian, "*defensor et patronus.*" The indefiniteness of the appellation is in keeping with the facts. It was indeed a process of slow formation in which the royal sovereign rights of later times were not yet sharply defined. An analogy with private lordship still exists everywhere; just as the oath of fealty taken to the

** The honorary prerogatives of the king belong pre-eminently to the social side, and it is accordingly not by mere chance that among the Celts in England, as on the continent, court officialism plays a more important part. Nationality, and the strong ascendancy of the great landed proprietors, combined to make the kingships there find pleasure in posing as the heads of great and noble households. The pedantic importance with which the law of Wales fixes the rank and the perquisites of the twenty-four court offices, according to their position at the king's marshal's and vassal's tables is very characteristic. Kemble's "Anglo-Saxons," ii. cap. 3, contains a chapter on the king's court and household. The chamberlain appears under the name of "Burthegn" "Hordere," "*Cubicularius*," "*Camerarius*," and "*Thesaurarius.*" The marshal is known as "Steallere," "Horsthegn," "*stabulator*," "*strator regis.*" According to the literal interpretation of the term, "overseer of horses," his duty was to superintend everything connected with the royal equipment, and thus he had an especial authority over the warlike followers; the frequent mention of it points to a certain importance attached to this court office. The steward ("Truchsess") appears as "*dapifer*," "*discifer regis*;" the Anglo-Saxon name was "Discthegn." The cup-bearer is found only in Latin records as "*pincerna*," "*pincernus.*" The smaller offices are so incidentally mentioned that from this single fact alone their small importance can be estimated. But even the higher offices are only honourable dignities for the "great Thanes," to whom the king, according to circumstances, also entrusts the command of his troops, or to whom he gives some high position in his council; but with no court office, as such, are specified State duties connected. The position of the "great Thane," and of the high official of State or Court, is frequently united in one person; but everywhere the signatures of the Prelates, of *Duces* and *Ministri* (Thanes), appear as the proper constituent parts. A title derived from a court office only occurs occasionally in the case of a few Thanes, and only among such as are not invested with the higher rank of Ealdorman (Dux, Comes) in the central administration, the signature of the Ealdorman always preceding those of the others.

king is word for word the oath of service taken by a private man to his Hlâford. Nevertheless very important changes in the social order in the army, and in the court of justice, as well as in the Church, originate in the power of the Sovereign.

I. **The Military Supremacy** was already contained in the old Ducal dignity, as being the highest command in the army, and is undisputed throughout the whole of the Anglo-Saxon times. Both before and after the union of the kingdoms the king fights in person at the head of his army, in the innumerable battles recorded in Anglo-Saxon history. Next to the king, Ealdormen appear most frequently as commanders representing him; his place is also often filled by a marshal (*stealllere*), or some other great Thane. A general vicegerency of an Ealdorman includes also the delegated command of the army. With this exception, there cannot be found, in the whole Anglo-Saxon period, any trace of the active command of the army being attached to any office or possession. Separated, again, from the leadership of the army is the power of deciding as to war and peace, and of regulating the distribution and equipment of the contingents. The decision on these matters originally rested with the people, without whose assent no national war could be entered upon. In later times, too, the king determined on such matters in the national council, which in the small kingdoms is identical with the county assemblies. After the consolidation of the great kingdoms with their subdivisions, the right of deciding the distribution of the contingents, under the direction of the royal governor, falls to the county assembly.(1)

(1) The *military sovereignty* must be distinguished with regard to its later development according to its three component parts.

a. The *decision touching war and peace* was from ancient times the concern of the people, wherever a real "national war" was to be undertaken.

b. The decree as to the *distribution and equipment* of the contingents was left to the individual shires in which the governor sat in council with the county assembly. The administrative character of these debates, regarding amount and distribution, appears also in the laws (Athlr. vi. 32. sec. 3).

c. The *personal command* of the national army. From the supreme command over the army proceeds the right to appoint all the other leaders. The punishment for omitting to join the army varied according as the king was present in person or not. In the former case the disloyal soldier might forfeit his property and his life (Athlr. v. 28, vi. 35; Cn. ii. 77).

The traditional limitations of the military power have no bearing upon the armed courtiers and personal vassals of the king; to summon them to his standard was a personal right, while their equipment was the business of the "Steallere." In the place of the old broken-down militia there stood now a force better versed in arms, equipped, and for the most part maintained, by the king's household, and by those of a few great lords who had the means of provisioning their men during a campaign. They were bound to their lord by a personal oath, which had not yet any connection with a fief of land, but which was only taken "on condition that he keep me as I am willing to deserve, and fulfil all that was agreed on when I became his man, and chose his will as mine." Herein there was only the first step to the later "feudal system." The Gesith-man may be a free landed proprietor, owner of a grant of folkland or loanland under very various conditions, or he may be landless and dependent solely upon the maintenance he receives in his lord's household. We perceive in the numerous feuds of the petty kingdoms with each other the wars carried on by a retinue of followers, and consequently these armed followers themselves attained side by side with the decay of the old land militia a wider extent and importance. The unsuccessful struggles with the Danes showed the unwieldiness and occasional uselessness of the old national array so clearly, that in the combats for deliverance, under Ælfred the Great, the personal organization by the king is throughout a prominent feature. The relation of personal service to the king, "Thaneship," extends by degrees to all possessors of five hides and upwards. From these times we meet with many occasions upon which, without any resolution on the part of the National Council, the people willingly followed the personal summons of the king. (1[a])

(1[a]) Originally, the position of the personal followers and of the armed courtiers was quite different from a legal point of view. Immediately after a conquest, the flower of the warriors, who under their leader or lord had won the victory, remained, in peace also, the nearest surroundings and companions (*comites*) of their chieftain. As the kingdom grew, the possibility, and

The military constitution of the national army and that of the royal retinue became in this way to a certain extent fused. Decisions touching peace and war could no longer be completely in the hands of the national council, although that council was, as a matter of fact, almost always consulted, and claimed at least the right of giving or withholding its consent when there was any question of exceeding the customary time of service, of entering upon winter campaigns, of naval preparations, and wars of conquest in distant parts, or generally of any unusual services. Similarly, in the county assemblies, the disposing powers of the royal officers in equipping the contingents had to be enlarged. In two generations after Ælfred's day, peaceful inclinations again had the upper hand; the kingdom again became powerless to resist the Danish invaders. Bold adventurers from among those northern warriors soon gain the position of great king's Thanes. The landed proprietors are only too ready to abandon the real war service to the newly formed retinues, who had been gained over by the gifts of offices and grants of folkland. The heavy-armed, experienced soldiery now consist for the most part of landless men under the command of great Danish Thanes. Already under Cnut a standing guard of three thousand housecarls appears—a class of soldiers with articles of war of their own, and completely severed from landed property. But as this institution, standing as it did in complete contradiction to the proprietary, financial, and social con-

with it the desire to increase the number of the followers grew also stronger (Kemble, i. 142). But seeing that the king chose his Ealdormen and Gerêfas from amongst his nearest followers, and appointed them to posts of confidence, the "follower-system" became fused with the supreme offices, and formed the later "Thaneship." In process of time this double relation was sure to react upon the altered position of the popular decisions concerning war and peace. The carrying on of war was in the ninth century no longer compatible with a war system, dependent on the resolutions of a national council, and on the innumerable and separate transactions of the county assemblies. In the complete ruin of the State, out of which Ælfred the Great raised his people, the observation of the old constitutional forms became impossible. Ælfred introduced a system of successive service, according to which in long campaigns the soldiers relieved each other; he built magazines for the provisioning of the army, at the expense of the State, and framed new regulations for the conduct of marine warfare and for the defence of fortresses. But the question of the extent of these arrangements has never been definitely settled.

ditions then existing, could not possess stability, it soon fell to pieces. An ever-recurring feeling of insular security prevented any lasting reforms in the military organization, either by a definite distribution in proportion to amount of property, or by regular arrangement and drilling of the masses capable of bearing arms. And this is what finally brought the Anglo-Saxon kingdom to ruin. The energy which, among the Langobardi, distributed military service on the principle of the Roman centuries according to landed and movable property, or which, as in the Carlovingian constitution, gave the State an immediate right to a fully equipped man for every four or five hides, was unknown to the Anglo-Saxons. This state of things explains the intricacies which in later times arose whenever a military summons was really issued (as, for instance, in the fatal year 999), for the allotment of the contingent in each district and sub-district could be disputed. Even the grants of folkland were not utilized for the purpose of regulating a certain proportion of men. The Anglo-Saxons had neither a perfected form of the "beneficial" system nor a "seniorat" (*vide* p. 95). The folkland was partly given away as an Allod, and partly revocably granted, with various burthens attached, but everywhere with the reservation of defence and guard duty, but not charged with supplying any fixed number of shields as an actual tax. Very numerous grants were made to the great Thanes in return for services done, and in expectation of services in the future; they were an expression of favour, but no basis for fixed war service. This is the most characteristic expression of the laxity under which the Saxon military system generally suffered.(1[b])

(1[b]) From the military rights of the king follows also the building of castles. It was of great importance to utilize at stated times, for such warlike purposes, the small freemen, whose services in actual warfare were seldom required. We find the same transition in the Carlovingian legislation (Carol. ii. Edict. Pistense, anno 864, c. 27. vol. i. 495). "*Ut illi qui in hostem pergere non potuerint, juxta antiquam et aliarum gentium consuetudinem ad civitates novas et pontes ac transitus paludium operentur, et in civitate atque in marcha wactas faciant.*" The system of fortifications in the Anglo-Saxon times was, in consequence of the difficulty of providing an adequate garrison,

II. **The Judicial Supremacy of the King** was the most important of the permanent powers which accrued to the chieftains in the transition from the old dukedom to the regal dignity. As "Mundbora" of the whole nation, the king was the supreme judge in the land, with power over limb, life, and property. The royal judicial office, however, still retained the formal character of the Germanic magistracy. It included the right of "regulating," of "administering," and of "executing," but not the right of "pronouncing the sentence," which belonged to the members of the community. In the united kingdom it was impossible for the hereditary supreme magistrate, in consequence of the extent of his territory, to sit in judgment in the old traditional places of justice (although instances occur of the exercise of this right); but the legal supremacy in its regular course displays itself in the ruling power which appoints the Ealdormen and Shir-gerêfas as royal justiciaries in the people's courts, and commissions these again to appoint the witan who find the judgment. As protector of the weaker portion of his subjects and of the general freedom, the king provides a speedy course of justice, and facilitates the prosecution of rights, by the frequent holding of court days in the subdivisions of the counties (Hundreds). The Hundred Court, which exists from the tenth century, appears in England as a branch of the County Court instituted by later positive arrangement. In order to shorten the way for litigants, to dispose of the ever-increasing mass of legal business, and to render it possible for the poorer freemen to fulfil their duties without being over-burthened, the less important matters were delegated to a local court, held every month, which sufficiently accounts for the indefiniteness in the limits of the jurisdiction of the County Court, and its position as a superior tribunal with respect to the Hundred Court, and for the presidency of the Shir-gerêfa in both. It is further the king who allows the

very faulty, and eventually, when the times of danger were over, always fell into decay. But no exclusive right of the king to the building of castles can be proved.

Manor Courts to enlarge their jurisdiction over petty criminal offences, who extends this jurisdiction to certain free allodial possessors, and who lends to the Manor Court the character and authority of magisterial power, besides defining and regulating the relations between private and public courts. The position of private magistrates as "Thanes of the king" prevents such rights as reside in them from being changed into mere rights appertaining to property, towards which result the interests of the landed classes were ever urging them. It was just these interests of the upper classes and the attachment to custom which jealously guarded the traditional jurisdiction of the courts. Though the royal judiciaries were only representatives of the king, the king was not allowed to arbitrarily hold his court in rivalry with theirs; but his province was merely to act as subsidiary to the others, supplying deficiencies in cases of a failure of justice, or where, from the high position of one of the litigants, an impartial administration of justice could not be obtained or expected from the County Court. This subsidiary position is most definitely laid down in Eadgar, iii. 2: "Let no one go to the king on account of a suit, except when his right has been denied him in the court, or he cannot attain to his right" (so also in Cnut, ii. sec. 17). It is the old principle, seen also on the continent, that when the lower magisterial powers refuse to do justice, the higher should interfere to compel its being done. In this sense "the king in the national assembly" appears as the highest judicial tribunal in the land, in which capacity he deals with the failure of justice, and judges powerful litigants; that is, he appoints, according to custom, a number of impartial "Witan" to find upon the question of Right; analogous to the manner in which Ealdormen and Shir-gerêfas in the Hundred Courts appoint judges out of the number of those lawmen or suitors in the county privileged to attend the court. In the later laws it is laid down as a universal proposition that "no one has any jurisdiction (socne) over the king's Thane, but the king alone" (Athlr. iii. 11); which, from the numerous

significations of the word "socne," may be understood to mean, that over the great Thanes in the Witenagemôte, against whom it would, moreover, be difficult to obtain justice in the country, the high jurisdiction of the king in the Witenagemôte should at once be exercised.—In the province of criminal jurisdiction especially, the assistance of the legislature was early needed to restrain blood-vengeance and to improve the method of proof by compurgators, who, after the tribal constitution had become dissolved, were chosen very irregularly from amongst neighbours, whom the powerful noble can find only too speedily, but the poor man only with the greatest difficulty. At this point the kingly power, at an early period, shows itself active in affording the protection of the law to the weaker suffering under the oppression of the stronger. Numerous laws were directed against private feuds. Certain of the compurgators were nominated and summoned by the royal bailiff; and thus inequality in degrees of power were in some measure obviated. For breaches of the peace we early meet with an extensive system of punishments inflicted on life and limb. Breaches of the law led to an extended system of fines for the protection of the person, of honour, of domestic authority, and of property. And here, finally, the royal judicial supremacy appears in the form of the privilege of pardon, but only so far as it is opposed by no private right to satisfaction (Wihtr. 26; Ine 6, pr. sec. 1; Alfr. 7, pr.; Athlst. vi. 1, secs. 4, 5; Edm. ii. 6; Edg. iii. 7; Athlr. iii. 216; Cnut, ii. 67). In Edg. iii. 2 it is generally laid down that where any one finds the judgment unduly hard, he may appeal for clemency to the king.(2)

(2) The legal power of the kings had become already established in the small kingdoms long before they became united into larger principalities. This legal power, however, only comprises the right to hold a court. The pronouncement of the sentence by members of the community constitutes during the whole Anglo-Saxon period a part of the "*ordo judiciorum*." The royal judicial supremacy shows itself in practice in the following points:—

a. In the right of appointing the Ealdormen and Shir-gerêfas as judiciaries. These officers exercise also a decisive influence upon the appointment of the judicial committees of the community. In the first place the agreement of the parties decides; failing that, we never hear

III. **The Police-supremacy of the King** proceeds from his position as "the highest maintainer of the peace." This peace-controlling power is the outcome and extension of the military command and the criminal jurisdiction, with which latter it is in England even at the present day allied. By the grant of the royal protection, special persons, places, and times became so hallowed that any violence done them was visited with condign punishment; and where a breach of the peace would have been committed, according to the law of custom, the punishment was increased, because of the "special peace of the king." The special laws concerning peace extend—

(1) To certain places: to the palace of the king and its surroundings (Athlb. 3, 5; Ine, 6; Alfr. 7; Cn. ii. 59); the residences of the upper classes, and, under other names, those of the lower classes as well, but more especially as "Cirik-frith" to churches and monasteries.

(2) To certain times: to the time when the militia is summoned (Alfr. 40, sec. 1; Cn. ii. 61); to the popular and court assemblies (Athlb. ii. 8; Athlr. iii. 1; Cn. i. 82); to market-meetings, meetings for taxation, and guild-meetings (Ine, 6, sec. 5; Athlr. iii. 1); to the coronation day of the king; and,

of a selection of judges by the community, because, by reason of the inequality of property possession and from the class interests which were dominant in the great courts, there was no room for it in proceedings in which the mass of the freemen only took part as spectators. In criminal proceedings, however, the accused participated in the selection.

b. As supreme judge over "*liberi homines*," the king allows the Manor Courts also a judicial power. In this sense the lord of the manor was royal "Thane" in his especial capacity of magistrate. The magistrate himself is liable to a fine for disobedience (Athlst. iv. 7), and is, together with the Gerêfa, nominated as official recorder in quarrels concerning barter and exchange (Athlst. ii. 10, pr.). The Land-Hlâford has to take care of stolen cattle until the owner is found (Edg. iv. 11; Athlr. i. 3, etc.). The *sôcne* of the private individual cannot extend over a royal Thane as a royal officer; at least this may be the dubious sense of the passage referred to above (Athlr. iii. 11, "*nân man nâge sôcne ofer cynges þegen, buton cyng sylf*").

c. As a matter of course the king appoints the local justices on the royal demesnes, as well as on those portions of the folkland which have remained under his immediate control, and in privileged districts also, whilst he accords many exemptions in his capacity of supreme magistrate.

d. The king as magistrate directly interferes where his appointed judge has neglected his duty (Cn. ii. sec. 17, cit.; Edg. iii. sec. 2, cit.; Athlst. ii. 3). The purely subsidiary position of the royal right of decision was still recognized at the beginning of the Norman epoch as customary law (Will. i. 43, Legg. Hen. i. 34, 6).

with regard to the Church, to fast-times and fast-days (Alfr. 5, sec. 5, etc.).

(3) To certain persons: widows (Athlr. v. 21; vi. 26); nuns (Alf. viii. 18) and the whole clergy; apparently also to the possessions and personal property of the clergy (Athlb. 1; Edw. Conf. 1, sec. 1). Moreover, the king was accustomed, on ascending the throne, and on special occasions, to proclaim "general peace orders," which primarily were nothing but a confirmation of the *lex terræ*, according to which breaches of the peace were punishable in the popular courts by customary law. The consent of the National Assembly, which usually accompanied it, the solemn vow taken by the powerful nobles present, the enjoining of their official duties upon the royal governors, bailiffs, and lords of manors, gave to these proclamations of peace a heightened power, which was nevertheless again forgotten in troublous times, thus necessitating perpetual repetitions. In the course of the Anglo-Saxon period the king's peace took the place of the common, or people's peace (*volksfriede*), which once proved the basis of social order. The king was thereby authorized, with the consent of the National Assembly, to reform the old system of composition, to threaten heavier offences with punishment of life and limb, outlawry, and forfeiture of estate; to abolish blood-vengeance, and, by means of bail, to secure the appearance of the guilty parties before the court. In all these directions the Anglo-Saxon period makes comparatively speedy progress. From the position of the highest maintainer of the peace was deduced a regulating power, which, without the consent of the National Assembly, created (beyond the province of ordinary breaches of the peace and breaches of right) new offences. For these heavy fines were fixed, whenever the judges recognized in them a breach of the proclamation of the royal peace.(3)

(3) The police power is a development of the legal and military powers combined, out of which latter proceed the legal grounds, the forms, and the means of constraint appertaining to the maintenance of the peace. From the power of punishing is developed first the idea of a preventative power. The right to command peace by means of personal orders

The blending of the office of supreme maintainer of the peace with that of commander-in-chief leads further to a union of the organization of the militia, its institutions, its districts, and its officers, with the objects pursued by "maintenance of the peace." The summons of the array may take place in the counties, even in times of peace, for the purpose of pursuing and apprehending peace-breakers (Edw. et. G., sec. 6; Cn. ii. 2, 29; ii. 48, sec. 6). The hundreds and tithings of the national militia are made responsible in the person of their *præpositi* for the maintenance of the peace; that is, for the arrest, safe-keeping, pursuit, and denunciation of peace-breakers. An important institution of this character was, moreover, that which compelled dangerous characters to find security for their good behaviour (Edm. iii. 7, sec. 1; Edg. iii. 7; Athlr. i. 4; Cn. ii. 25, 30, 33). Further still, landless persons were obliged, under threat of the withholding of legal protection, to join a "tithing," *i.e.*, a small community with a responsible head, "*præpositus*," "headborough," or to seek some landowner as their lord, who would guarantee their appearance before the court. As a general principle of law this is first laid down in Edg. iii. 6: "And every man shall find security, and the surety shall lead him and hold him to all right, and if any such do wrong and break out, then shall the surety bear what he should bear. But if it be a thief, and the surety can lay hold on him within twelve months, he shall deliver him over to justice, and shall receive back what he has paid."

lay in the military command of the king. Among the warlike tribes of the continent the notion of military service and punishment in default, which was part and parcel of the military organization, was extended to the province of law, and led to an enlargement of the powers of the magistracy. In England peace-jurisdiction is primarily the outcome of the judicial power and the duty of protection (*mundium*) combined, and "*mund*" and "*frith*" appear to have the same signification; and, on the other hand, the institutions of the militia are utilized for carrying out the measures dictated by the peace-jurisdiction. A general proclamation of peace was usually issued by the kings on their accession. In the course of generations people became accustomed to refer back the rules of the civil law in these proclamations of peace, so oft repeated, so frequently confirmed in the National Assemblies, and so continuously employed by the courts of law—so that the old "folkspeace" passes into a "king's-peace," which includes the sanction to punish all the heavier crimes and offences.

For such as are not established in the household or on the land of a Thane, the tithings of the military organization are now made use of, and the man without a surety has to join these in such a way that either a special surety or the "*præpositus*" is answerable for him. This is insisted upon in Cn. ii. 20 as an universal institution of the country:—"And we will that every freeman be brought into a Hundred and a tithing, whoever will be entitled to purgation by oath, and to where, if any one kills him after he is more than twelve winters old, or be he no longer worthy of the rights of a freeman, be he one of the household or servant. And let every one be brought into a Hundred and under security, and let the surety constringe and lead him to all his rights."

The system of police security appears thus to have been definitely worked out. Every Thane is responsible for his household, and his village Gerêfa for the peasantry who were settled on his lands. The other independent freemen had to endeavour to gain so much confidence among the free peasantry that these latter through their headborough would undertake the security for them. The money-responsibility fell finally upon the community as a common duty, which in Norman times was inaccurately (from an external point of view) described as a "mutual security." Of course this system made it difficult for any landless man to change his habitation. A right of free migration was certainly recognized as an established principle; and all Hlâfords are ordered by law not to prevent any "*liber homo*" from looking for another lord or Hlâford-sòcn (Athlst. iii. 4, iv. 5, v. 1). But the departing freeman had first to prove that he had completely fulfilled all his duties to his former lord, and that he had obtained permission of the latter to leave his service; otherwise the new master cannot receive him (Edw. ii. 7; Athlst. ii. 22, iii. 4, v. i.; Edm. iii. 3; Cn. ii. 28). In connection with this system of a local police was a further responsibility of the Hundred for the due pursuit of thieves and for the production of their members before the court. According to an isolated document, it was attempted to create, as on

the continent, a presentment making it the duty of the Hundred to give information on oath (Athelr. iii. c. 3., sec. 3); but the exact form of this cannot be gathered from the Anglo-Saxon laws. The insular position of the country, and the pre-eminently peaceable character of the later Anglo-Saxon times, developed the maintenance of the peace to such a perfection, that the chroniclers give an almost Arcadian picture of the peacefulness and security of the land in the time of Ælfred the Great and at some subsequent periods.(3[a])

IV. **The Revenue of the Anglo-Saxon Kings** has, primarily, the same foundation as that of every great landowner, in the private property of the king; which is acquired, pos-

(3[a]) The system of "mutual sureties" has formerly, in a very exaggerated manner, been made the basis of the whole Anglo-Saxon constitution by arbitrarily referring maxims of the Norman period to former centuries. This is the case with Maurer's treatise on the "Freipflege" (1848). As against this it is necessary to review all the information we possess as to the Anglo-Saxon surety, as, for instance, that given by Schmid in his "Glossarium" (pp. 644–649). Of very decided merit in clearing up doubts is Marquardsen's work, "Ueber Haft und Bürgschaft bei den Angel-Sachsen" (1851), with the results of which Konrad Maurer ("Krit. Zeitschrift," vol. i. pp. 87–96) agrees, after careful investigation. A still fuller review of the numerous opinions on the subject is given by Waitz ("Verfassungs-Geschichte," i. pp. 424–473). The meaning of all this legislation is that, as on the continent (in the "Edictum Pistense" and the "Capitula Langobardorum"), those without any property —"*sine proprietatibus in regno nostro degentes, atque non habentes res aut substantiam, quibus constringi possint*"—should be brought before the court by some resident, and vouched for—"*ut eos præsentent aut pro eorum malefactis rationem reddant*" (cf. Waitz, "Die Verfassung," iv. p. 363). Where a village has undertaken to find bail, the opponent only comes upon the *præpositus*, who, in case he cannot bring the bailee before the court, has to pay the fine himself, which he if possible recovered from the guilty party or eventually from his peasantry. This proceeding, so far as its consequences are concerned, led to the tithing being made answerable, which in Norman times was described incorrectly as "mutual security." This state of things I also find indicated in the Leges Edw. Conf., cap. 20, sec. 4 (Harley's text): "*Quod si facere non poterit*" (if the *præpositus* cannot clear himself)" *restauraret dampnum, quod ipse fecerat, de proprio forisfactoris quantum duraverit, et de suo; et erga justitiam emendent, secundum quod legaliter judicatum fuerit eis;*" and, according to Hoveden's text, cap. 19, sec. 4, "*Quod si facere non possit, ipse eum Frithborgo suo dampnum restauraret de proprio malefactoris quantum duraret. Quo deficiente, de suo et Frithborgi sui perficeret et erga justitiam emendaret.*" With reference to the further responsibility of the inquisitorial duty of the Hundred, the Anglo-Saxon laws mention the pursuit of thieves and the production of members of the community before the court (Edg. i. 5; Cn. ii. 20; Hen. 8, sec. 2; Will. i. 22, iii. 3, etc.). The Hundred is responsible *in subsidium* for the *villa* for the non-discovered *murdrum* (Edw. Conf. c. 15, 16). The principal passage relative to the presentment is that in Athlrd. iii., c. 3, sec. 3, certainly only an isolated one.

sessed, enjoyed, and is subject to alienations and testamentary dispositions, in the same manner as other Bocland. Besides the king, the queen also (and here is a difference from the usual matrimonial property law) can possess, manage, and dispose of estates in land in her own name. The king's rights of usufruct in the folkland, and in all the land that had not been assigned to individuals, on the occupation after the conquest (either because it was, from the nature of it, not suitable for grants, or that it chanced not to have been distributed), were originally much more important. These estates, which remained at the disposition of the community at large, fell to the disposition of the highest Hlâford; but with the reservation that the National Assembly retained its right to give or refuse its consent, whenever Folkland was to be converted into Bocland, *i.e.* to be irrevocably granted away. Large portions of the folkland were, indeed, in most parts of the country made over to the Ealdormen, Shir-gerêfas, and other royal officials in lieu of a salary, and certain portions formed, until the close of the Anglo-Saxon period, the customary endowment of various offices. Great portions of the folkland, again, were lost by gifts to churches, monasteries, and foundations. A large part of what remained was utilized in maintaining the armed retinues of courtiers, and the personal servants of the king, in rewarding services rendered, and in bestowing marks of favour. Although they were legally revocable, yet such grants were for the most part permanent; with the exception of rents and services occasionally reserved, the immediate enjoyment was thus lost to the king. In the course of time, the universal eagerness for the acquisition of land, the power of the great nobles, and the influence of the favourites, led more and more to that allodification, which is chronicled in many existing records. From this time, accordingly, only single and separated rights of usufruct flow to the king from these sources. Especially springing from the original position of the conquered land, and from the right of disposition over unappropriated property, there arose a royal right extending

over harbours, landing-places, and military roads, which became the source of customs and dues; also a right to salt-works and lead-mines, to flotsam and jetsam, and treasure-trove. A royal right with ill-defined limits attaching to forests is also probably deducible from the same principle. In Cnut's time, police regulations concerning forest and the chase appear, in which were included important rights of usufruct.(4)

The profits derived from the control of matters of war, justice, and police became more important to the kings, as in course of time their private enjoyment of the folkland and unoccupied land ceased.

From the military power of the sovereign, first arose the right to the services of the people in the building and keeping in repair of the royal residences and castles, which services were rendered by the small freemen of the national militia, as a common burden. From the system of personal vassalage springs, again, the right of heriot, by virtue of which, on the death of the vassal, the armour or a pecuniary equivalent falls to the king. In the time of Cnut, when the position of the public officers as Thanes had become more developed, there appeared a general statute (Cnut. ii. sec. 72) which fixed the heriot of the earl at eight horses, four suits of armour,

(4) The financial rights are dealt with at length by Kemble, ii. pp. 42–87. The king's rights of usufruct in the *ager publicus*, or folkland, were important up to the later Anglo-Saxon times. From the original circumstances connected with the conquest, arose further a royal right over the high roads, harbours, and landing-places, which was the medium for especial peace proclamations, and for the tolls payable by ships and foreign merchants. Property thrown up by the sea was regarded as abandoned, and was the subject of a re-grant ("Cod. Dipl.," No. 809), or formed an immediate source of revenue under the name of *naufragium* (Leg. Hen. i. 10, sec. 10). The right of forest was originally an outcome of conquest, through which the existing woods became folkland, or common; that is, the subject of common enjoyment. In course of time, with the assistance of the police control, a sort of forest royalty arose, the ancient form of which was doubtful, but which in the comprehensive *Constitutiones de foresta* of Cnut is indicated by an extensive system of forest and hunting laws, reserving important privileges to the sport-loving rulers of the land. The forest laws of Cnut already distinguished the "higher chase" as regal, from the lower chase. The existing text is, however, merely a later Latin translation and revision, which affords no reliable evidence of the age of many of the rules contained in it. All these sources of revenue may be described as "direct," in contrast to the following, which proceeded from the magisterial rights.

and two hundred *mancus* of gold; and so on in descending proportions was fixed the heriot of the greater and smaller Thanes. In Cn. ii. sec. 74, seq., a usufructory right of wardship and marriage was recognized, which was, however, certainly only intended to affect the widow and children of the vassal who had been directly equipped by the king. (4[a])

From his judicial authority arises the right of the king to forfeited property. Bocland, as well as movables, according to the later laws of the kingdom, fall to the king in consequence of treason, theft, and other offences. Much more considerable are the numerous fines, which in the manorial courts are payable to the private magistrates, and in the royal courts are reduced by the fixed portions reserved to the Ealdorman and Shir-gerêfa. (4[b])

From the police control, besides the extensive system of fines, there proceeded a privilege of market, which was turned to profit by means of the reservation of certain payments. The police control led further to an increase in the system of tolls, which were levied in harbours and navigable rivers; and

(4[a]) From the constitution of the army proceeded the right to acquire the assistance of the national militia, whenever a residence or a castle of the king was to be built or walled round. The performance of these duties, as a part of the *trinoda necessitas*, was, as a rule, reserved in all deeds of grant, even of the freest description. From the special right of vassalage proceeded, again, the right to heriots. The heriots of Bishops, Ealdormen, and Thanes are frequently mentioned in the records of the tenth century ("Codex Dipl.," 492, 593, 699, 716, 957, 967, 979, 1173, 1223). It is doubtful, however, whether they were a general incident of the right of thaneship, or were only demanded of such followers as had actually received their equipment from the king. In the laws of Cnut (Cn. ii. sec. 72) the heriot appears as firmly fixed for the earl, for the higher Thane who "stood near the king," and for the lesser Thane. It is also mentioned in Domesday Book as a settled source of revenue. As to the profits arising from wardship and marriage, see Kemble, ii. 80.

(4[b]) From the judicial authority flows a considerable right to forfeited property. As early as the laws of Ine, the forfeiture of goods and chattels followed upon fighting within the king's palace (Ine, sec. 6), treason (Alfr. sec. 4; Athlst. ii. 4; Athlr. v. 30, vi. 37; Cn. ii. 57); and harbouring and succouring thieves (Athlst. i. sec. 3, and other laws). The Anglo-Saxon records give many instances of forfeiture both of Bocland and of movables for robbery and other offences. Much more important were the profits arising from the numerous fines (Edg. ii. 3; Athlr. vii. 8; Cn. i. 8). In later times the whole of the royal fines were granted to the landowners. The laws of Cnut already show a reversion of the old rule, and enumerate six offences as a royal monopoly, the fines accruing from which are still reserved to the king (Cn. ii. 12–15). In Wessex and Mercia the same principles are applied; according to the Dane law, these privileges were somewhat circumscribed.

to the raising of protection moneys from merchants, Jews, and other foreigners who needed protection. (4c)

On the other hand the right of direct taxation was in the beginning unknown to the Anglo-Saxons. The Germanic chieftain might exact tribute from vanquished peoples, but "from his own people he only received presents, especially cattle and fruits." Such honorary gifts were presented on the occasion of the meeting of the popular assemblies. Likewise, when the king journeyed in the district over which his military and legal jurisdiction extended, he and his suite were entertained free of expense; and this custom became extended to the journeys of the royal governors and messengers and their trains. It is equally erroneous to regard as taxes the duties and payments, *Cyninges Gafol*, which accrued to the king from his demesnes, from the folkland, or from conceded rights, or as protection-money paid to the proprietor of the soil, although they were so regarded by Kemble and others. The Germanic community, great and small, state as well as parish, was based upon a personal relationship in the military and legal functions, and retained this character with more tenacity than we find in the structure of the Roman or Celtic states. Only in a condition of the deepest degradation, under Æthelred the Unready, could the National Assembly be induced to levy a tribute upon the country, to buy off the horde of Danish pirates. This tax, which was apportioned to the several hides, was then repeatedly paid as tribute to the invader, and from time to time also to the king, under the colour of protection-money, to enable him to guard against

(4c) From the police control was developed a market right. The closely connected right to raise tolls in harbours, and from the transport on the main roads and navigable streams brought the king indirectly considerable revenue. Without doubt the king decided which landing-places should be opened to all, *gefrithed;* whence arose the privilege of a free harbour. The right to raise tolls was more frequently the subject of grants to private persons, and yet more frequently of documents of enfranchisement, according to which an equivalent or a permanent revenue might accrue to the king. From the maintenance of the peace arose undoubtedly the right to protection accorded to foreign merchants, and later extended to the Jews (Leges. Edw. Conf., sec. 25) as the source of the protection tax. This right to protection, with a claim to Weregeld, is accorded only to actual foreigners (Edw. and G. 12, Athlr. viii. 33; Cn. ii. 40; Hen. 10., sec. 3, 75, sec. 7).

fresh invasions. The tax became finally fixed as *danegeld* at twelvepence for each hida. It was, however, merely a sign of the decline in the last century of the Anglo-Saxon state. Its origin, its name, the irregular manner of levy, and the exemption of the clergy from it, all make this danegeld appear as an anomaly. (4[d])

Of course there was no such thing known in the Anglo-Saxon times as an exchequer administration. The free right of disposal of the king over all the State revenues is shown by an account given by Asser, according to which Ælfred devoted one half of his revenues to the Church and the other half to civil purposes. Out of the civil half he allowed one third for his warriors and followers, one third for hospitality, and one third for the innumerable artists and builders whom he had collected around him from foreign parts.

V. **The Protectorate of the Church** forms the last important right of the crown. It originated in the fact that the reception of the new faith and of the priesthood throughout the whole country was decided by edicts of the kings and the National Assembly. Hence, even in later times, the controversies among the clergy touching the time of celebration of Easter and other ecclesiastical differences were settled by the king. Among the original insignificant kingdoms in the

(4[d]) It is well known that a right of taxation did not exist in the Germanic kingdom. Tacitus speaks of gifts of cattle and fruits of the earth. Lodging and entertainment on progresses through the realm were extended from the person of the sovereign to those of his retinue, and, after the fashion of all honorary gifts, from being a mere matter of courtesy became a kind of right. And this soon led to the right of lodging and entertainment being extended to the royal messengers and servants, and came to include the providing of horses, the transport of baggage, and the maintaining of the train of followers. Many possessions and profitable rights belonging to the king were granted to monasteries and landed proprietors with the express reservation of such honorary gifts. In process of time the confusion of mere custom with these reserved rights caused many a mischievous extension of them. Against these abuses, which are so frequently referred to in later times, the well-meant provision of Cnut was directed (Cn. ii. 69, sec. 1). With reference to the historical circumstances of the first Danegeld, see Lappenberg, i. 423. These shameful tributes had risen in 1018, to 82,500lbs. of silver. The apportionment according to hides was also acted upon in making naval preparations. In the year 1008, by an express resolution of the Government, a ship of war was furnished by every 310 hides. With regard to the immunity of the clergy, see Leg. Edw. Conf. cap. 11. Under Eadward the Anglo-Saxon Chronicle mentions the Danegeld as abolished.

British Isle it could not easily be forgotten that the Church owed its toleration, its reception, and its dominion to the authority of the king; and that the rich endowment of bishoprics and monasteries was due in great measure to his liberality in granting Bocland and in gifts of private property. The papal throne was too far distant to be able to raise pretensions to rule in a community which was neither wont nor inclined to dissociate authority from the personal presence of the ruler. The native prelates, again, in these small Anglo-Saxon states, stood so near the indigenous population, that it was difficult for them to raise exaggerated hierarchical pretensions. On the other hand the Church was obliged, as throughout the world in the Middle Ages, to endeavour to attain an independent position for its servants, if its official organization was not to be confused with the military, legal, and police constitution of the laity. The royal protectorate, therefore, applies rather to the outward framework of the Church, and does not interfere with its inner life and administration of details. The Anglo-Saxon king exercised the right of appointing the Bishops; in the face of which, the right of election which the Church aspired to in its canon law, could not practically assert itself any more than the occasional attempts at nomination by the papal throne. And again, in the monasteries, the manner of their foundation frequently led to a royal right of appointing the abbots. Just as indisputable is the right which resides in the king of sanctioning the resolutions of the Ecclesiastical Councils. A further union between the ecclesiastical and temporal community arose from the association of the prelates with the Thanes in the Witenagemôte, and from the appearance of the Bishop and the Ealdormen together in the County Assembly. In an insular seclusion the idea of the close bond of communion between Church and State is fostered and kept alive. (5)

(5) The protectorate by the king of the Church comprises in the first place the royal right of appointing prelates. This has been recognized in a fairly impartial manner by Lingard, "History of the Anglo-Saxon Church," i. 89. The great majority of precedents proves that the bishops especially were ap-

The sum total of these honours, powers, and profits formed itself under the Anglo-Saxon sovereigns into an hereditary family right. It is certain that the royal landed property contributed at first to this conception; yet this element of hereditary descent does not by any means preponderate in the Anglo-Saxon kingship. But more decisive was probably the feeling that a permanent personal authority was necessary for the present form of the community, as a counterpoise to the class-privileges which were growing up. The first object to be attained was the abolition of the struggle of the powerful families and their dependants for the possession of the supreme power. This end was attained so soon as the right of one of the princely families that sprang from Wodan was established beyond all question. The unity of the succession, and a certain precedence accorded the firstborn, was a natural though not an absolutely necessary deduction. The rule that in the case of private property the last will of the owner is

pointed and displaced at the free will and option of the king. It is also a significant fact that so many royal chaplains were raised to episcopal seats (Palgrave, i. 173, 174). According to Stubbs' view, the choice by the clergy was the rule in peaceful times, and for the less important seats. On the other hand, appointment by the king in the National Assembly is frequent in the case of archbishoprics and the larger dioceses, when the consent of the National Assembly to the admission of a new member was regarded as a matter of course, as was proved by their consecration by their fellow-bishops.

The right of the king to give his consent to the resolutions of the clergy originally dates from the fact of the reception of the new faith at court, with the consent of the National Assembly. In olden times the king even appears in the capacity of president, at assemblies which bear the character of proper ecclesiastical councils (Cod. Dipl. No. 116, Willibald vita Bonifacii, ii. p. 338). When Church and State became somewhat more separated, the principle was certainly adhered to, that any change in the external institutions of the Church, such as the regulations for the observance of the Sabbath, fasts, feasts, and Church dues, should be sanctioned by the king and Witenagemôte. The great question of monasticism in the tenth century was repeatedly deliberated upon in the Witan (Kemble, ii. 189). The enactments of the General Council in the Anglo-Saxon legislation often form two categories: first, Ecclesiastical, and secondly, Temporal. (Leges Æthelstan, Eadmund, Cnut, etc.) Both categories were, however, published as "King's Laws," and their contents show it to have been generally received that new obligations could only be imposed upon laymen by the king in the National Assembly. The might of the sovereign is seen again in ecclesiastical disputes. In the first two epochs of a struggle between the king and the ecclesiastical hierarchy, at the time of Bishop Wilfrid and Archbishop Dunstan, the king triumphantly asserts a control over the resolutions of the Church, and over the right of appointing and dismissing prelates, against Rome as well as against the ecclesiastical councils at home.

final, was observed also in the case of the succession to the throne. As in the old folk-law, martial prowess was regarded as the necessary condition of complete fitness in the community, so it remained in the highest degree the necessary condition of the Anglo-Saxon kingly dignity. The times of the "boy kings" could not come until the West-Saxon dynasty had been consolidated by the unbroken succession of three glorious rulers. But just as the old Germanic village community tested the prowess of the youth in times of yore, so now the voice of the people could not be excluded in considering the question, whether the monarch to be appointed was worthy to lead the martial array of the nation. The Church also, from the time when it decided the preliminary question, whether a Christian marriage in accordance with God's laws had been concluded, and whether a legitimate heir had sprung from the union, laid claim to a share in recognizing the new ruler from this point of view. Accordingly it resulted that in the succession to the throne, the younger son was not unfrequently preferred to the elder, and the martial brother of the monarch to the immature and physically or mentally weak son.

A further result was the retention of a form of election at the enthronement of the new king, when not only the upper classes, but the whole nation, represented by the numerous *liberi homines* who were present, recognized by acclamation the new sovereign as their rightful ruler. But allowing for this, the character of an hereditary family right was decidedly maintained in the Anglo-Saxon time. "The royal authority was never allowed to be separated from the royal race." The elevation of Cnut to be king of the entire nation of Danes and Saxons, to the exclusion of the youthful sons of King Eadmund (1016), was an act of necessity and of military force, for which amends were made twenty-six years later by the unanimous proclamation of Eadward the Confessor, the last king of the race of Cerdic (1042–1066). But the Anglo-Saxon sovereignty still remained a "personal" dignity and authority over the Angles, Saxons, and Danes.

The king's reign dates only from his coronation; his ordinary title is not that of king "of the land," but "of the people." The feudal notion of a lord of the soil over both land and people is the later creation of the Norman sovereignty. "Kings were the leaders of the people, not the lords of the soil" (Palgrave, i. 62).†

† The hereditary nature of the Anglo-Saxon sovereignty is treated from a one-sided point of view, if the feudal principle of primogeniture in landed property is taken as the starting-point, whence it would appear that out of nineteen successions to the throne in the united monarchy, not less than eight were irregular. Even at the zenith of the Anglo-Saxon dynasty Ælfred takes precedence of his elder brothers, and Æthelstan of his legitimate brothers. But in the latter case a legitimation by the reigning king, with the approval of the National Assembly and the clergy, had certainly preceded the accession. Every so-called irregularity in the West Saxon succession may be referred to testamentary disposition, to agreements respecting claims of inheritance, or to the personal incapacity of the person passed over. Ælfred the Great, in his will, expressly makes his title to the throne dependent upon (1) the will of his father, (2) an arrangement with his brother Æthelred, (3) the assent of the Witan of Wessex. Expressions indicative of popular election are retained for centuries afterwards, such as in the phrase "chosen and raised" to be king, which recalls the very ancient popular custom of raising upon the shield. In coronation ceremonies there is always a tendency to retain old formulas, even when the original meaning has vanished. There is in them something analogous to the assent of the "bystanders" in the later popular courts. Palgrave (i. 562) describes them as a confirmation of the inchoate title of the sovereign. How firmly the hereditary right of the family stood, is proved beyond doubt by the period of the six so-called boy kings and by the solemn recall of Æthelred the Unready (who had been expelled by the Danes) even after the fullest proofs of his incapacity. Still more unjustifiable is it, when certain older instances of the dethronement of the king by the discontented nobles, as in the cases of Siegebert of Wessex and Beornred of Mercia, are cited as precedents for establishing a constitutional right residing in the Witenagemôte to depose the king. (See Palgrave i. 653, 655.) The question whether an Anglo-Saxon king is to be regarded as "ruler of the people" or "lord of the soil" cannot be determined from single records, in which the clergy, writing in Latin, express themselves variously according to their individual tastes. Appellations, such as *totius Britanniæ Monarchus*, *Rex*, *Rector*, *Basileus*, occur already in the records of the tenth century. Ælfred the Great in his will calls himself merely "king of the West Saxons," his son Eadward on his coins "*Rex Anglorum*." Cnut's style, who calls himself "King of all England" (*Eallas Englalandes*), "King of the Danes and Northmen," with an intelligible allusion to the idea of a conquered country, is singular. Eadward the Confessor calls himself again "*Rex Anglorum*" or "lord of the Angli" (Saxon Chron. 1066). The early Norman kings call themselves on their coins "*Rex Anglorum*," in their charters sometimes "*Rex Angliæ*." Upon the great seal the title "*Rex Angliæ*" appears first under King John (Allen, Prerogative, p. 50, 5).

CHAPTER III.

The Union of the Kingdoms, and the Divisions of the Realm.

The social conditions out of which the Anglo-Saxon kingdom arose, led firstly to a plurality of small states. In the separate territories, in which the petty tribes and followers under their chiefs had settled, that system of property had also arisen which led to the rise of the royal dignity. The chiefs, although wielding power of various degrees, regarded themselves all alike as descendants of Wodan. A similar striving after independent authority animated them and their followers, their petty national and legal assemblies. Closely crowded together, they felt a keen longing after new acquisitions of territory, and yearned to satisfy their wonted lust for strife and booty, and thus soon became involved in countless quarrels and feuds, to which no natural limit set bounds. Mingled with these civil feuds were serious and endless struggles with their ancestral neighbouring foes in the west and north, the Britons and Scots. The constant state of readiness for war, which such a condition of things demanded, gave the skilled and better equipped retinues an increasing superiority over the humbler peasantry, who became more and more reluctant to forsake home and hearth, to engage in a profitless warfare with their kindred neighbours. In the course of the earlier generations of Saxon settlement, these petty wars had destroyed a number of small chiefs and kingdoms, of which history has not even preserved to us the names.

After the territorial boundaries had become more settled, there appeared at the commencement of the seventh century, seven or eight greater and smaller kingdoms: Kent, Sussex, Essex, Wessex, East Anglia, Mercia, Deira, Bernicia; the two last became early united and formed the original Northumberland. Historians have described this condition of things as the "Heptarchy," disregarding the early disappearance of Sussex, and the existence of still smaller kingdoms. But this grouping was neither based upon equality, nor destined to last for any length of time. It was the common interest of these smaller states to withstand the sudden and often dangerous invasions of their western and northern neighbours; and, accordingly, whichever king was capable of successfully combating the common foe, acquired for the time a certain superior rank, which some historians denote by the title of "Bretwalda." By this name can only be understood an actual and recognized temporary superiority; first ascribed to Ælla of Sussex, and later passing to Northumbria, until Wessex finally attains a real and lasting supremacy. It was geographical position which determined these relations of superiority. The small kingdoms in the west were shielded by the greater ones of Northumberland, Mercia, and Wessex, as though by crescent-shaped forelands—which in their struggles with the Welsh kingdoms, with Strathclyde and Cumbria, with Picts and Scots, were continually in a state of martial activity. And so the smaller western kingdoms followed the three warlike ones; and round these Anglo-Saxon history revolves for two whole centuries until in Wessex we find a combination of most of the conditions, which are necessary to the existence of a great State.*

* As to the principal features of the so-called Heptarchy, compare Lappenberg, i. p. 203 *et seq.*, 242 *seq.*, 277 *seq.* Kemble, "Anglo-Saxons," cap. 1. A detailed sketch of the particulars of the separate states is given by Palgrave ("Commonwealth," Cap. ii.), arranged in chronological tables; and by the tables of kings affixed to the first volume of Lappenberg's history. The smaller kingdoms which have been named, in addition to the Heptarchy, are the kingdom of the Jutes in the Isle of Wight, Suthrige, or Surrey, Hecana, or Hereford, Middleanglia, Elmeta, the land of the Huricas, the land of the Lindiswaren, and others. The "Bretwaldaship," at the time of the Heptarchy, has been the subject of various misconceptions, the

Fairly well and evenly populated, protected by no natural boundaries, and ever obliged to be in a constant state of military preparation against the Welsh, Wessex exhibits in its development some similarity to the great Marks of Germany. Military discipline, a legal succession, and a tolerably well-regulated internal administration, kept the Anglo-Saxon military organization here in better order than elsewhere, until, at the commencement of a new century, a king (Ecgberht, 800–836), who had been brought up at the court of Charlemagne, took the reins of government into his hand. Sagacious and energetic, he subjected the Mercian group of states, and won a recognized sovereignty over the whole country of the Angles and Saxons south of the Humber.

Under Ecgberht, the kingdom of the Anglo-Saxons first takes its position among the European states. With him begins a period of internal peace, beneficial for the consolidation of the constitution, and for the intellectual development of the people. Soon, however, recurs a period of unfortunate struggles with Danish and Norwegian pirates, whose mode of warfare brings the military array of the United Kingdom into disorder. But the common misfortune which befell the country at the same time strengthened the feeling of unity in the West Saxon portion of the land. Under Alfred the Great, the Saxon people rise to throw off the yoke of the

more so as the word has been erroneously brought into connection with the Britons, whilst it etymologically expresses only the "powerful far-ruling one." Bæda gives a detailed list of seven Bretwaldas: Ælla of Sussex, Ceawlin of Wessex, Æthelberht of Kent, Redwald of East Anglia, Eadwin, Oswald, and Oswi of Northumbria. The Anglo-Saxon Chronicle says nothing further about the earlier times than that Ælla had first exercised an extensive sway. Later, the Anglo-Saxon Chronicle, A.D. 827, calls King Ecgberht "the eighth king who was Bretwalda." This Bretwaldaship has very correctly been referred to its real signification by Kemble ("Anglo-Saxons," ii. c. 1. pp. 7–19), as being an actual Hegemony (*cf.* also Freeman "Conquest," i. Appendix B) The union of the kingdoms under Ecgberht caused the introduction of the name "England" as the collective denomination. An old register of the Abbey of St. Leonard in York (cited in Dugdale's "Monasticon") contains the somewhat curious notice: "*memorandum quod anno domini* 830 *Egbertus rex totius Britanniæ in Parliamento apud Wintoniam mutavit nomen regni* (*de consensu populi sui*), *et jussit illud de cætero vocari Angliam.*" William of Malmesbury says that Ecgberht brought the kingdoms into a "*uniforme dominium*," and that he called this "Anglia." But Ecgberht only calls himself in one single charter of the year 828 "King of the English," elsewhere, generally, "King of Wessex."

invaders, and to regulate by treaty their relations with the Norsemen. A generation later the brilliant government of Æthelstan brings the Danish portions of the country into complete subjection. The realm and dynasty have now attained the pinnacle of that peculiar development which later times have associated with the name of Ælfred. He, the deliverer of his fatherland from the Danish yoke, the monarch in whose person the noblest moral and intellectual qualities of his race were combined with martial prowess, appeared in later generations to a grateful people as the author of all that was honourable and good, extending from ancient to later times. Three successive governments, those of Ælfred, Eadward, and Æthelstan, supplemented somewhat later by the fortunate government of Eadgar, have irrevocably founded monarchy as the personification of the political unity of the British Isle; after that, indeed, follows a second period of struggles with the Danes, in which the ancient royal race shows itself at times almost as degenerate as the Merovingians and the Carlovingians of later times. After a generation of incredible weakness and humiliation, under Æthelred II. the nation exchanges its old royal race for the energetic rule of Cnut, the Dane, whose line quickly dies out, and is followed by Eadward the Confessor, the last legitimate heir of the West Saxon royal house.

The century from the accession of Ælfred the Great to the death of Eadgar (871–975) is accordingly the era of consolidation, in which the country and people form a group, the framework of which has endured with marvellous stability until the present day. The formation of the English counties, and in great measure of their subdivisions also, dates from this century, in which the Anglo-Saxon laws have expressly called the county and hundred districts divisions of the realm, of which the tithings, although erroneously, are considered the lowest member.

I. **The Formation of the English Counties or Shires** was the product of the later unity of the kingdom. Ecgberht's kingdom had certainly not yet attained to any unity in the

political administration, but only to a recognized suzerainty, under which the former kings continue as mediatized under-kings. But after the dying out or removal of these mediatized chieftains, near kinsmen of the ruling house (Æthelingi), or other nearly related or connected great Thanes, succeeded to the place of these under-kings, until the advancing unity of the realm gradually brought all these rulers down to the position of mere government officials. Besides this, in the greater kingdoms, which had early attained a stricter unity, a division was made into districts, which were newly formed by the executive. The periodical assembling of the Witan for holding the great central court of justice, appeared impracticable in districts that had become of too great an area. Similarly, the organization of the militia required to be arranged according to divisions of the land, of not too wide an extent. This want was satisfied by the formation of administrative divisions under the name of "*Scire*" (derived from *Scyran*, to divide), which, at the time of their origin, were just as much an arbitrary formation as are our new "divisions" of counties. The abstract name "Scire" (not *gau*, *gà*, which does not occur in the Anglo-Saxon laws) is accordingly used also for the greater districts of the ecclesiastical administration, the bishops' dioceses, etc. In Wessex, where at a comparatively early date an organized administration existed, we find mentioned among Ina's laws a prefect of the shire (Ine, 36, sec. 8), and the change of residence from one Scire to another (Ina, 39). Similarly in the great Mark known as Mercia, an administrative subdivision must soon have become necessary. Incidentally, too, even before the time of Ælfred, certain names denoting "scires" are mentioned, as such "Hamtûnscir" (in 755), "Defenascir" (in 851). When after the deluge of Danish invasion, and the unutterable confusion under Ælfred (after 880), the kingdom came to be divided with the Northmen, a thorough territorial division appears to have been made for the purposes of the army, of law, and for the system of the maintenance of the peace; which we might have conjectured

from internal reasons would have been the case, even if it were not substantiated by proofs. Although under Æthelstan, Eadgar, and Cnut, principally in consequence of the union and subsequent separation of the territory surrendered to the Danes, many modifications may have been introduced, the century of the zenith of the Anglo-Saxon monarchy is the period in which was laid the foundation of the division into counties. Owing to the preponderance of the northern invaders, who returned after Æthelred's time, a permanent portion of the Danish element was retained, so that from thenceforth the counties were formed into the three great groups of the Saxon Law, the Dane Law, and the Law of Mercia. At the close of the Anglo-Saxon period, Simon of Durham, and Aldhelm, Abbot of Malmesbury, give the following list of thirty-two counties, which forms a safe basis upon which to proceed.

"*Anglia habet triginta duo Sciras extra Cumberland et Cornwalas. (In Cornwalas sunt septem parvæ Sciræ.) Sunt hæ triginta duo Sciræ divisæ per tres leges: West Sexenalaga, Denelaga, Marchenelaga.*

1. *West Sexenalaga habet novem Sciras: Suthsexia, Suthwai, Kent, Berocscira, Wiltescira, Suthamtescira, Somersetescira, Dorsetescira, Devenascira.*

2. *Denelaga habet quindecim Sciras: Eborascira, Snotinghamscira, Deorbiscira, Leorcestrescira, Lincolnescira, Norhamtunscira, Huntedunescira, Grantebrigescira, Northfolc, Sudfolc, Eastsaxe, Bedefordscira, Hertfordscira, Midlesexa, Bukingehamscira.*

3. *Merchenelaga habet octo Sciras: Herefordscira, Gloucestrescira, Wircestrescira, Scrobscira, Cestrescira, Steadfordscira, Warewicscira, Oxenefordscira.*"

According to the position of the territorial divisions these thirty-two permanent counties form the following three groups:—

a. The historical distribution into counties prevails on the southern and eastern borders of the kingdom, which, at first conquered from the sea, became thickly populated by Angles

and Saxons and early attained to a political organization. Here were formed from the two kingdoms of Kent and Sussex, the later counties of the same name. The kingdom of the East Saxons formed the counties of Essex and Middlesex. East Anglia is split up into the territory of the North-folk and the South-folk, and in later times into the counties of Norfolk and Suffolk. In Wessex the settlements of the Wil-saetan, Dormsaetan, and Samorsaetan form the later counties of Wilts, Dorset, and Somerset, which retained the ancient names of old independent kingdoms.

b. The second great territory is formed of Mercia, the old great Mark against the Britons, and of the interior of the country. Here the administrative formation of the shires is shown by the fact that all counties were called after the name of some place which had acquired a certain importance, and was suitable for the meeting place and the centre of the administration. All names of counties here have an Anglian, Saxon, or northern nomenclature, denoting a place; such as -ham, -ford, -ton, -byrig, -wick, -by, -cestre (*castrum*); Hert-ford-shire, Buckingham-shire, Northampton-shire, etc.

c. The great Northumbrian kingdom, the northern portion of the land, after stormy and varying fortunes, became in some parts colonized at a later period, and unequally formed. The more northern part (Bernicia and others) belonged later to Scotland; in the southern portion Lincoln, York, and Durham formed counties called after a principal town; Rut-land and Cumberland are, on the other hand, clanish names; Northumberland and Westmoreland were named from geo-graphical peculiarities, and were not received into the rank of the counties until a later period.

After these events great differences must for a long time have subsisted between a governorship, formed out of an old mediatized kingdom, and one that proceeded from the admini-strative division of a greater kingdom; differences which only in process of time were adjusted by legislation and con-tinuous practice. The laws regulating the rights and duties of the royal Ealdorman and Shir-gerêfa must be regarded

also in the light of such adjustments. All adjustments must have the same tendency, to make these territorial divisions as divisions of the jurisdiction of the king, in war, law, and police, dependent on his will. Hence the traditional principle —"*Divisiones scirarum regis propriæ sunt.*" (Edw. cap. 13.) (1)

II. **The Hundreds** appear in the statutes as the regular sub-districts of the county only after the tenth century, under Eadgar. They must, however, be anterior to this date, for the Hundred is the old Germanic division of the military system, which recurs among all Germanic races, as also among the Saxons on the continent. That the name soon became applied to a district, which after the settlement had

(1) The division into counties or shires has by later legal tradition been directly attributed to Ælfred, and the difference in origin between the historical and administrative shires been ignored. To what an extent the word "shire" or "division" is used to denote a public government district, is shown by the fact that the earliest mention of a shire in the Saxon Chronicle relates to a bishop's diocese, "biscopscira" (Chr. Sax. 709). And in the laws of the Anglo-Saxon kings "shire" often means an ecclesiastical diocese. (Edm. ii. 4; Edg. iii. 3, 5; Athlr. v. 6; vi. 1, sec 3, 21.) Gradually the "shire" becomes the exclusive appellation for the great county districts for the purposes of military and legal organization. Among the laws this meaning first occurs in Ina, 36, sec. 1, 39; Alf. 37 pr., sec. 1. That under Ælfred a thorough territorial division took place is credibly asserted by William of Malmesbury (De Gest. Angl. ii. 4), but he only speaks of a division "*in centurias quas hundred dicunt.*" Ingulf ("Historia Croyland," i. 41) says very positively; "*totius Angliæ pagos et provincias in comitatus primus omnium commutavit; comitatus in centurias, id est hundredas, et in decimas*, i.e. *tritingas divisit.*" By later critical investigations (Palgrave, *Quarterly Review*, 1829, vol. 67, pp. 289—298), it has now been established that this writer was not the old Anglo-Saxon abbot, but a pseudo-Ingulf of the end of the thirteenth or commencement of the fourteenth century, who, however, drew his information from the old chronicles. In point of fact his assertion agrees with all the rest. The Saxon chronicles before the time of Ælfred know only of the old divisions after clan names, and territories; Cantwaraland (Kent), Westseaxan, Suthseaxan, Eastseaxan, Middelseaxan, Eastengle, Northanhymbraland, Suthanhymbraland, Myrcnaland, etc.; but after Ælfred's days the customary terms became altered, and the various manuscripts use only the word Scir (Kemble, i. 63). The most probable date of a thorough division into provinces is shortly after 880, *i.e.* after the peace between Ælfred and Guthrun. A proof of this is furnished by William of Malmesbury, and others in the list quoted in the text. Quite identical with it, only with different orthography, is the list given by Bromton (X Script. ed. Twysden, p. 956). The country between the Ribble and the Mersey, the Lancashire of modern times, does not appear in Anglo-Saxon times as a separate department. A few small shires, which had been for some time independent, were in later times incorporated with others, as Winchelcombeshire with Gloucester. As to the system of the division into counties compare Palgrave, i. 117, and the introduction to the Census of 1851.

to provide one hundred men for the militia, can be deduced from the variously interpreted passage of Tacitus (Germ. cap. 6), "*quod primo numerus fuit jam nomen et honor est;*" but it follows with greater certainty from the nature of the case and from later indisputable circumstances. Certain it is that, soon after the settlement, the militia was organized as far as possible in equal contingents, which became a territorial division, so soon as it became necessary to apportion the duty of furnishing the contingents according to extent of landed possessions. As, however, legal rule on this point was never established, as necessity and ability to supply it were continually producing changes, owing to the vicissitudes of the times, the diversity of tenures, and later to the frightful ravages of the Danes, the distribution of land remained even in still later times a matter of arrangement, and was left to the decision of the county under its royal governors and bailiffs.

The rule in this case which has been preserved to us was, "*Divisiones hundredorum et wapentagiorum comitibus et vicecomitibus cum judicio comitatus*" (Eadw. Conf. 13). And hence it is clear why the Hundred is recognized so comparatively late as a fixed territorial division, why the Saxon Chronicle does not mention the Hundreds, and why the Saxon documents concerning property so seldom describe the position of estates with reference to the Hundreds. As districts of the early militia organization, and consequently of the peace-control, the Hundreds were certainly in existence long before Ælfred's time. As to the universal appearance of the Hundreds in the Germanic militia system, the work of V. Peucker ("Das Kriegswesen der Germanen") gives a new and convincing proof. The silence of the Anglo-Saxon legal authorities of the early centuries cannot be entitled to any regard, on account of the extreme rarity of their allusions to the military system. But it may be taken as certain that at the reorganization of the State by Ælfred, a thorough revision, or redistribution, was made of the districts furnishing contingents. William of Malmesbury (ii. 4) expressly describes

these new divisions made by Ælfred, as "*Centurias, quas hundred dicunt.*" In the language of Wales and Hibernia, the word "*cantred*" is used instead of Hundred, and in the north we find the term "Wapentake," derived from a military usage in mustering the troops. When the monarchy was at its prime, the Hundred in the Anglo-Saxon statutes denotes a sub-district of the shire, geographically limited, with its separate assemblies for the purposes of army, justice, and maintenance of peace. In these later times the Hundred Court is the ordinary court for freemen, and holds its sittings every month. The division into Hundreds in the form which it assumed at that time remained in existence almost to our own day. As in the division into counties, here also an historical and an administrative principle worked in different directions, and created great inequalities. In the southern portions of the country, which early became thickly populated, the number of Hundreds was very large:—in Kent, sixty-two; in Sussex, sixty-four. The midland counties are to a certain extent different, Dorset having forty-three, Suffolk twenty-one, and Essex twenty Hundreds. In the north, where the population was thinner, the cultivation more defective, the land poorer, and the organization developed at a later period, the numbers are remarkably small: in Warwick, four Hundreds; in Cumberland and Westmoreland, four Wards; in Stafford, Worcester, Rutland, five Hundreds; in Leicester, Nottingham, Derby, Lancaster, six; in Durham and Northumberland, six Wards; in Cornwall, nine Hundreds. In large provinces sometimes an intermediate division between County and Hundred arose, as the "Trithings" (or third portions) of Yorkshire. (2)

(2) The division into Hundreds is often referred to in old records as a union of a hundred *hidæ*, or families; from erroneous confusion with these, a hundred *villæ* are sometimes made out of them, as in Bromton (ed. Twysd. p. 956), and Ranulphus Cestr. (i. 50). Spelman (p. 365) says on this point, "*Nusquam (quod scio) reperiuntur* 100 *villæ in aliquo Hundredo per totam Angliam. Nescio an medietas. Magni habentur qui vel* 40 *vel* 30 *numerant. Multi ne* 10: *quidam duas tantum et nonnulli (ut Hundredi de Chetham, Warden, etc. in Comitatu Cantii) unica sunt contenti.*" The correct view probably is, that the occupier of a peasant's hide, *familia*, should furnish one man to the original settlement of small peasantries; so that frequently at the

III. A division into Tithings, Teothings, Decaniæ, has been erroneously held to be a general territorial division of the Anglo-Saxon period. This mistake was caused by the account given by the pseudo-Ingulf, who informs us that Ælfred divided the counties "*in centurias, id est hundredas et in decimas, id est trithingas;*" in this a mistake is already apparent in the word "trithing." The division into tithings for the purposes of the old military array, in which the numbers ten and one hundred can be proved to have been nearly everywhere the units of the organization, was indeed very ancient. The national militia had likewise always had its "tithings," but these did not lead to a division of territory, for the apportionment of the contingents remained a shifting matter of administration for the smallest divisions, much more than for the greater ones. What the Anglo-Saxon statutes really contain touching the Tithings (*decaniæ*, or theôtings) is limited to the following:—According to Athelst.

time of the first colonization a Hundred contained a hundred hides under the plough. But as the districts for contingents were more permanent than the state of cultivation, the Hundreds, in their later state, contained much more than a hundred hides under the plough; sometimes less, where there had been a falling off in prosperity. The great Hundreds in the north, which had been formed later, are, taking the one hundred hide standard, disproportionately large (in Lancashire, on the average three hundred English square miles), whilst many a small Hundred contains scarcely more than a quarter of a mile. Hence it is that later historians expressly assert the indefiniteness of the hide-measurement (cf. Gervas, Tilb. i. cap. pen., "Dialog. de Scaccario," "*hundredus ex hydarum aliquod centenis, sed non determinatis constat: quidam enim ex pluribus, quidam ex paucioribus consiant.*") This inequality led, in the later Middle Ages, to the division in some counties of Hundreds into half-Hundreds; whilst, on the other hand, two Hundreds, or one and a half, were sometimes united for the purposes of administration. The persistent retention of the division into Hundreds is explained by the fact that the Hundred Court was held every four weeks as a regular court (Edw. ii. 8; Edg. i. 1, iii. 5), and thus the conservative character of all judicial systems became communicated to the Hundred. That administrative convenience was largely considered in the earliest divisions, is proved by the fact that, whenever possible, the Hundred grouped itself round a given place, suitable for a centre. Of the 799 names of Hundreds, Wapentakes, or Liberties, which are in existence at the present day, no fewer than 362 are identical with a town lying within them ("Introduction to the Census of Great Britain," 1851; also as to the Hundreds generally, see Laudau, "Territorien," 215, 216). In certain counties a middle division occurs. In Kent there are to be found several Hundreds united under the name of Lathes, which exercised the same judicial powers as the Hundreds. In Sussex is found a division into Rapes, without any jurisdiction, which remained with the Hundreds. York and Lincoln were divided into Thrithings (third parts), which still exist under the name of Ridings.

vi. 4, the members of the Tithing should, on summons, join in pursuing criminals. According to Athlst. vi. 8, sec. 1, those who rule the Tithing (the heads) should meet the Hyndemen in London every month to maintain the peace. According to Edg. i. 1, 2, notice of a theft should be given to the Hundred men and Tithing men. According to Edg. i. 1, 4, no one was allowed to possess chattels (cattle) unless he had the certificate of a Hundred man, or a Tithing man. According to Cn. ii. 26, every free man shall be brought into a Hundred or Tithing, for the purpose of police sureties. It is evident that these quotations refer to police institutions and constabulary societies formed of the inhabitants, but not to local districts, or village marks. In numerous records of this period, the position of estates is determined by reference to the Hundred, but never to the Tithing-district. Among the innumerable details contained in Domesday Book, the words "*decania, decenna,* teôthing, tything," do not once occur. The local districts of the Anglo-Saxon administration were, for the most part, determined according to the tenures of the properties. The numerous settlements made by "*coloni,*" upon loan-land, the submissions of the allodial peasants to a Hlâford, as well as the subsequent extension of the jurisdiction of manorial courts over the allodial peasants, rendered the type of dependent communities the prevailing one, and a territorial division according to free peasant villages impossible. Difficult as it is to obtain a reliable picture of the local organization of the kingdom, at this, its lowest stage, it is perfectly clear that the nature of the existing societies absolutely excluded a territorial division into "Tithings."(3) The existing local societies, on the other hand, are as follows :—

(3) The local divisions of the Anglo-Saxon territory can never be clearly understood from historical sources. The old error that the Anglo-Saxon "Theothing" is a geographical local district, has, however, become established owing to a passage in the pseudo-Ingulf, who connects the matter with a register of landed property which Ælfred is said to have drawn up, "*talem rotulum ediderat, in quo totam terram Angliæ in comitatus, centurias, et decurias descripserat;*" whilst William of Malmesbury only says that it had been ordered, "*ut omnis Anglus haberet et centuriam et decimam.*" Ingulf makes of this,

Lordships with their tenants and dependents. First in importance were the royal demesnes, on which a royal bailiff combined the management of the estate with the levy of the royal dues, with the legal jurisdiction over the tenants, and with other functions of militia and police. A similar position belonged to the Gerêfa of great private estates. These villeins and servants do not exactly live in regular villages, but are settled in the vicinity of the lord's seat (afterwards the "manor"), and increase in numbers as landless wanderers come and settle amongst them and put themselves under the police protection of the lord of the soil. Ten families form the smallest community recognized for police purposes, and for the appointment of a provost (*præpositus*). As such, under the later system of police sureties, they form their own police union as a manorial Tithing, as well as a court for the settlement of local disputes; by later grants of land this was extended even to the allodial peasantry settled among them, "*super omnes allodiarios, quos eis habeo datos*" (Codex Dipl. No. 902).

Incidentally, too, the *parishes* under the spiritual office of the parson were associated with these, though the former were formed independently, embracing both freeholders and villeins, servants and landless settlers, and were therefore bodies suitable for initiating the separate local government system in England in later centuries.

Larger unions of more independent folk, united for the administration of justice under a royal or manorial Gerêfa,

"*ut omnis indigena in aliqua centuria et decima existeret;*" the former words express an association of persons, the latter contain a description of a local district. As the militia system of the fourteenth century had introduced local tithings under a petty constable, the pseudo-Ingulf thought that this state of things was already existing in Anglo-Saxon times; and he brought the system of police sureties (in the confused way in which the author of the Leges Edw. Conf. 20, describes it) into connection with it, fantastically portraying the "*decenna*" under its tenth man, as a village court, exercising a formal jurisdiction, analogous to that of the Hundred under its Hundred-man, and the county under its Shir-gerêfa; which gives the idea of a system of many thousands of judges chosen by the people! Instead of this chimerical network of smaller and smaller courts of law, we can only find in reliable authorities that picture of local administration which I have delineated; within which no free village courts and villages can possibly be formed of a mere militia system.

and often freed from the duty of appearing as lawmen in the Hundred, were for the most part entirely or partially co-ordinated with the Hundred. This was an advantage for those who participated, and their legal duty was lightened in that, under the guidance of a magistrate, they formed a separate judicial district, with the powers of a Hundred. Of equally vital importance to the freeholders in their relation to the neighbouring Thanes, was the protection of a powerful magnate; to which were sometimes added certain advantages of wood and pasture. The question here is not one of submission of person and property, but of a magistracy (soca), under which the heritable property of the "socmanni," and their immediate obligation to serve in the military array, remained unchanged. Towards the close of the Anglo-Saxon period the grant of a whole Hundred sometimes occurs. For instance, under Eadward the Confessor, a certain Hundred in Berkshire was granted to the Abbot of Abingdon, and a Hundred in Surrey to the Abbot of Chertsey, with the command "that no royal Shir-gerêfa hold court there," or interfere in legal matters (Cod. Dipl., 840–849).

An analogous but more compact creation is found in the numerous royal or manorial *Burhs*, which constitute, under a separate Gerêfa, a special jurisdiction, in which a Burh-gemôte, held three times a year, is combined with the Hundred Court (Edg. iii. 5; Cn. ii. 18). The origin of the Burh is apparently due to the need of a military protection in the Danish times. A hill with a rampart of earth or a strong wall, was sufficient protection against the sudden attacks of robber bands. In the statutes "Burh" or "Byrig" signifies also a single fortified building (Edm. ii. 2; App. iv. 15; Athlr. iii. 6), as well as a town (Athlst. ii. 20, secs. 1–4; Edg. iv. 2, pr. 3, 4, 5; Athlr. ii. 5, sec. 2; ii. 6; Cn. 34). Discerning rulers like Ælfred made use of the remains of old "*civitates*" and "*castra*" and other advantageous positions for such fortifications, and the protection which these afforded was readily sought by the neighbouring freeholders, tenants, and vassals, and also by landless men and small tradespeople

who were living amongst the servants and followers of the landlords. The differences in the legal position of the people thus crowded together rendered expedient the appointment of a special royal magistrate (Gerêfa), who was also endowed with extraordinary military, police, and financial functions. At the close of the Anglo-Saxon period the *Burgenses*, and in later times the constitution of the English municipal boroughs, arose from these beginnings.*

Wedged in among these numerous degrees of property and power came the rest of the freemen, who on their heritable possessions preserved intact their independent position in the military, legal, and police institutions. In many parts of the country these peasant communities lay close enough together to enable a free *teothing* to be formed out of ten or more households. But often where the free peasants were scattered about at great distances, it was with difficulty that they were brought together into a "teothing," while the greater part of them had already been incorporated into the system of lordships, magisterial, and bailiff jurisdictions.

In the inner administration of the country these various local groups clash with each other and are not kept distinct. Most of them have no exclusive local jurisdiction; the majority do not form exclusive local districts. A separate magistracy of the king or of a landowner does not exclude military duty

* The formation of the Burhs is, according to the convincing reasoning of Kemble, not in any way immediately connected with the British-Roman towns of the fifth century, which Gildas, in the sixth century, represents as being already forsaken and in decay. Still the existing ruins would in later times be utilized for the purposes of fortification. In certain places the name "city" was retained in memory of an old "*civitas*." The peculiar life of the Burhs is due to the fact that the free tenants, tenants on granted land, dependants, servants, and bondsmen of the king, as well as of private lords, lived densely crowded together, and that under the Burh-gerêfa the legal, police, and finance administrations were united in one person. That the *Burgenses* as such were not released from military duty is shown by many accounts given by the Domesday Book (*e.g.* Bury St. Edmunds, 371). But many Burhs were favoured by being rated for the purpose of furnishing the contingent at a small landed property scale of 5 hidæ, 15 hidæ, or 20 hidæ (Chester at 50, Shrewsbury at 100 hidæ). Of course the royal dues were proportionately raised, and hence the burhs became more important for the finance control than for the defence of the country, as the fortresses had again been allowed to fall into ruins. Kemble (ii., pp. 470–478) has selected from the Anglo-Saxon Chronicle the names of eighty-eight places, all of which may in some measure be regarded as fortified.

in the Hundred. The tenants within the jurisdiction of private courts, in quarrels with outsiders, come under the jurisdiction of the Hundred Court. The police organization is arranged partly according to the military and partly according to the legal districts. Thus within the narrow limits of a castle, and in the vicinity of a lord's "*mansus*," freeborn men might be living close together under manifold legal conditions, having very different duties to fulfil towards the king or their own mesne lord.

Hence we are led finally to the negative conclusion that there existed no systematic formation of local districts, and, moreover, that the Tithing was no such local division.**

** All these local distinctions cross and overlap in the most varied fashion. But it remains firmly established that the personal liability to military service continues independently of the subjection to a magistrate's jurisdiction, and that the peasant farmers, who were actual tenants, in case of disputes with third persons, appeared before the royal Hundred Court. The legislation accordingly remains based upon the old constitution; that is, upon the free community. County and Hundred assemblies are now, as formerly, active in all matters affecting military, legal, and peace control, even above the interests of property. This legal rule, however, does not exclude the fact that dependence on property is the most important element in regulating the conditions of life, and that the division into separate estates with their tenants represents the prevailing local division. "Instead of the earlier division into free landowners and landless freemen, a division of the people into landlords and tenants has been introduced" (K. Maurer, "Münchener Krit. Ueberschau," ii. 59, 60).

CHAPTER IV.

The Offices of Ealdorman and Shir-Gerêfa.

A MUTUAL bond of union connects the districts with the arrangement of the offices of the Anglo-Saxon kingdom, namely, the two principal offices of Ealdorman and Shir-gerêfa. In them, as in the districts, an historical and an administrative principle clash together. The former is predominant in the origin of the Ealdorman, the latter in that of the Shir-gerêfa.

I. **The Ealdorman, Dux, Comes,** is the highest civil official of Anglo-Saxon times. When the union of the smaller kingdoms with the greater began, the sovereignty of the new common ruler was confined at first to privileges and profits, whilst the former petty state retained its own General Assembly, and, with a sub-king at its head, preserved its military and legal system. The oldest Ealdorman was actually a Viceroy, "*subregulus*," which title often occurs in the signatures to Anglo-Saxon documents. In his decrees he used the royal style: "*cum consilio episcoporum, optimatumque meorum.*" The province of such Ealdormen embraced, in fact, a former independent state. He was not unfrequently the subjected king in person, or a member of his family, or else "*Æthelingi*," near kinsmen of the reigning Over-king, were appointed to such places of trust. The name "Ealdor," too, is a reminiscence of patriarchal chieftain-lineage of a former period. It does not signify a man old in years, but the "*superior*," "*senior*," in a higher, more exalted position. Even in the times of the Heptarchy the military, legal, and

police organization draw closer together. The Ealdorman becomes more dependent upon the central administration. The new administrative division of the great kingdoms into shires causes the appointment of new governors, who are at first merely the highest district officials, and whose district assemblies do not involve any customary right of independence. The mention of Ealdormen with such official positions runs side by side with the gradual rise of the division of the kingdom into shires. In the early organized kingdom of Wessex the Ealdorman is mentioned in Ine's laws, which the king promulgated with the advice "of all his Ealdormen" (Ine, pr.), and in which also the disobedient Ealdorman is already threatened with the loss of his shire (Ina, 36). The small kingdom of Kent appears at the commencement of the eighth century to have had as yet no Ealdormen, whilst on the other hand, in a National Assembly, held in 814, the names of three *Duces* of Kent and sixteen *Duces* of Mercia are found among the signatures. Hence it is clear that even before Ælfred's day necessity had led in the greater kingdoms to administrative governorships. The confusion caused in the original state of affairs by the invasion of the Danes and the reorganization of the whole land by Ælfred led to a greater uniformity in the administrative character of the Ealdormen. This assumption is confirmed by the Eigils-saga of Iceland, c. 21 (K. Maurer, "Krit. Ueberschau," i. 86), which tells us, "Ælfred the mighty had taken away from all *Skatconunge*" (*i.e.* viceroys) "their name and their power. Jarls, those were called from henceforth who had been called kings, or kings' sons." In the flourishing period of the Anglo-Saxon monarchy the Ealdorman now appears as the governor appointed by the king in a threefold capacity.

(*a*) Together with his County Assembly he directs the equipment of the militia and the apportionment of the contingents, and brings them to the royal army. He may also, when commissioned by the king, take the command of the whole army, in which capacity he is mentioned on important occasions in the Anglo-Saxon Chronicle, which speaks of

Ealdormen as commanders of single counties (in the years 837, 845, 851, 853, 905), or Ealdormen simply as commanders of a whole army (in 851, 871, 894, 992, 993, etc.). In the statutes this capacity is regarded as being a matter of course.

(*b*) He presides at his County Assembly, as at the ordinary National Court (Ine, 50; Alfr. 38; Edg. iii. 5). "Let there be held . . . twice a year, a Shir-gemôte, and let there be present at the Shir-gemôte, the Bishop and the Ealdorman, and both shall here administer spiritual and temporal rights;" which is almost word for word repeated in Cn. ii., sec. 16.

(*c*) As guardian of the peace within his district, he exercises the royal police jurisdiction. To him the peace proclamations of the king are, in the first instance, directed. The right of supplementing ordinances, which lies in the royal maintenance of the peace, gives him also a derivative licence to issue peace proclamations within his district. The breach of his peace is punishable by the infliction of a special peace fine (Athlr. iii., c. 1). Any man who intends to change his master, must give notice to him (Alfr. 37). After a breach of the peace has taken place, his duty is to prevent feud, and to protect the weaker party (Alfr. xlii. sec. 3); to take surety from men accused as breakers of the peace (Edm. iii. 7, sec. 1); and to assist the inhabitants of royal burghs to the utmost, in securing breakers of the peace (Athlr. ii. 6).

The combined position which proceeded from these various functions was one of the highest dignity and the highest rank, which, according to the legal system of the times, found expression in a weregeld, as high as that of the bishop, and four times as high as that of the common Thane (App. vii. 2, sec. 3); in an increased punishment for breach of the Burg-peace (Ine, 6, 45; Alfr. 40); in an increased Burgbryce and Mundfyrd (Alfr. 3.; Cn. ii. 58; App. iv. 11); in an increased fighting Wite (Alfr. 15, 38; App. iv. 12); and in a special right of asylum (Athlst. iv. 6, sec. 3; v. 4, sec. 1; App. iv. 5). For official income he had the use of considerable portions of the folkland, and a third of the forfeits, fines, and other royal dues which fell to the king. The Ealdorman in this

position is the most eminent official in the kingdom, and has the first place in the temporal council of the king; but only in his capacity of governor, whose right depends upon the king's commission, and whose office expires as soon as this is withdrawn. In the beginning the Ealdorman had certainly been a successor of the king of the country, and at his appointment the form of election by the popular assembly probably continued for a long time. But a free right of election could not possibly be recognized, if the incorporation of the mediatized kingdom was to last; indeed, the kingship asserted as a principle a right of deposition (Ine, cap. 36). It is told of Ælfred, that he emphatically reminded his state officers "that they had their office from God and from the king." (1)

Certain changes were brought about during the last century

(1) On the office of Ealdorman and Earl, Heywood "On Ranks," pp. 55–117, contains a lengthy exposition. The Latin terms, *Dux*, *princeps*, and *comes*, are very arbitrarily interchanged, as also are *consul*, *patricius*, *præfectus*, according to the fancy of the cleric who drew up the record. The introduction of analogies of the *comes*, *dux*, and *senior* of the Carlovingian constitution is also confusing, for these dignities had different territorial, possessorial, and national foundations, and an early history of another type. It was quite natural that in the aristocratic development which the political organization took, the class of Ealdormen should be identical with a small number of the greater landowners. The office of Ealdorman appears at an early period attached to the great families, but is not hereditary. Amongst Ealdormen whose names have been handed down to us, instances occur of father and son following immediately one another, but this is very seldom; on the other hand, the deposition of an Ealdorman is very rare; and intermarriages between the Ealdorman and the families of the Anglo-Saxon kings are very common. All these conditions are the expression of the power wielded by certain great families, and of a strongly marked class privilege, but not as yet of an hereditary nobility. Still less, under such a condition of things, could the office of Ealdorman be elective, of which even Kemble speaks erroneously (ii. 126). Among the statutes of Eadward the Confessor (cap. 32a, sec. 2, in Lambard's text), the following isolated and extraordinary notice appears *de herotochiis*. "*Erant et aliæ potestates et dignitates constitutæ, qui Heretoches apud Anglos vocabantur, scilicet barones, nobiles, etc. Latine vero dicebantur ductores exercitus; apud Gallos, capitales constabularii, vel marechalli exercitus. Isti vero viri eligebantur per commune consilium—et per singulos comitatus in pleno folcmote, sicut et vicecomites provinciarum et comitatuum eligi debent*," etc. This pretended election, as well as the name "Heretoches," is quite foreign to Anglo-Saxon ideas. It must not be forgotten that these statutes are a private work dating from the twelfth century, in which the learned author introduces, in a hundred places, his own knowledge of the continental popular rights, a knowledge accessible to the clergy. Seeing the heavy weight of Norman officialism, at the time that work was written, nothing would be more popular than the idea of a free general election of the highest officials in the county. Not merely the right of deposition, which was a recognized right (Ina, c. 36, Cod. Dipl., No. 1078), but all the monuments of Anglo-Saxon law and history, are opposed to the idea of elected Ealdormen.

by the influence of the Danish element. Among the northern pirates, we find, besides the kings, commanders-in-chief called Jarls. This northern term was related to the Anglo-Saxon Eorl, which from time immemorial signified a man of great rank, and was well adapted to be blended with the Eorl or Earl. For some time accounts of battles speak of Ealdormen on the Saxon, and Earls on the Danish side. As early as the statute of Eadward and Guthrum there occurs (in c. 12) the common name Earl (also in Edg. iv. 15). The influence of the Danish element naturally gained strength in the second period of the Danish rule after Æthelred (Athlr. iii. 12). Under the reign of Cnut, history records only the appointment of new "Earls." Cnut's law touching the amount of the heriot (sec. 7), only speaks of "Eorl;" in the Shir-gemôte (Cn. ii. 18) we again find the term "Ealdorman." More important still was the breach which was at that time made in the ancient position of the noblest Anglo-Saxon families. Danish families, and sometimes also bold warrior upstarts, in a great measure supplant the old race of the Ealdormen, and with the varying fortunes of battle the governorships also become thoroughly altered in character. In times anterior to these it had been often found advisable, for the protection of the country, to unite several shires under one Ealdorman. Under Æthelred this tendency to centralize the commander's office increases, evidently in order that the whole army of a district may be more speedily massed, and employed with greater effect, at the points threatened by the enemy.

With this idea Cnut formed four great provinces, at the head of each of which a great Eorl was placed, whose rank answered to a ducal rank, even according to the higher standard of the Continent. Under Eadward the Confessor, this grouping of the counties is again altered, and for a short time we hear once more of Ealdormen and Eorls side by side. But as since Cnut's day the idea of a higher and greater governorship had been attached to the appellation of "Eorl," the title which was considered the higher, became,

as is usually the case, the dominant one. The Anglo-Saxon Chronicle after 1048 speaks only of Eorls. In the language of later times, the old honourable title of "Alderman" was only retained for the authorities in inferior local administrations. (Leges Henr., vii. sec. 2; viii. sec. 1; xcii. sec. 1.) (1[a])

II. **The Office of Shir-gerêfa** appears to have been a second official position under the Ealdorman, instituted for the administration of the whole county. In rank coming next after the Ealdorman (*Ealdormannes gîngra*, Alf. xxxviii. sec. 2), the sheriff attained in process of time an increased importance, and at the close of the Anglo-Saxon period had become the most important official of the active administration. In marked difference to that of the Ealdorman, the office contained no remains of the old royal dignity, but had a purely administrative, even a pre-eminently economic character, which was caused by its financial connection with the great landed properties. Every Anglo-Saxon magnate had to collect rents, payments in kind, protection moneys, and dues; to superintend the service of his followers, to settle their disputes, and to satisfy the royal demands relative to the military array and the legal and police duties. The officer appointed with full power to fulfil these functions was called Gerêfa, a name which includes also the ordinary estate-bailiff. In a higher degree, however, the king needed in the different districts of his kingdom a head-gerêfa for the exercise of his rights of usufruct and to undertake the varying duties of the royal administration. This gerêfaship so thoroughly pervaded the whole life of the Anglo-Saxon times that in the Norman period the collections of private law found occasion to remind

(1[a]) The alteration of title is the first change referable to the Danish times. The substantial change made by Cnut is of more importance, when he divided the country into four considerable provinces, in 1017. Wessex is reserved by Cnut for himself; East Anglia is entrusted to Thurkill; Mercia to Eadric Streona (who, as an Anglo-Saxon, still bears the title of Ealdorman); Northumbria to Eric, as an upper governorship. This alteration must have only materially affected the constitution of the army. The holding of the county court in such an extensive district was practically impossible. The old smaller county districts remained in existence, as court assemblies, in which now the Shir-gerêfa regularly presided. Hence, with this change, a separation of the civil and military administration was brought about.

their contemporaries of its original signification. Thus, in the laws of Eadward the Confessor we read (cap. 32), "*Greve autem nomen est potestatis; apud nos autem nihil melius videtur esse, quam præfectura. Est enim multiplex nomen: Grere enim dicitur de scire, de waepentagiis, de hundredo, de burgis, de villis.*"

In the statutes the appellation *cyninges-gerêfa* is accordingly not unfrequently carefully added to distinguish the royal gerêfa in the popular court from private gerêfas (Alfr. 22, 34; Cn. i. 8, ii. 33). The county administration of the united kingdom afforded, as the royal rights were increasingly developed, the most urgent occasion for the appointment of such an official, who was called by the king in his public edicts "his gerêfa:" "If one of my gerêfas will not do this, he is guilty of disobedience towards me, and I will find another who will" (Athlr. ii. 26). Equally significant in relation to the official status of the gerêfa is the official penalty or punishment for disobedience, with which he is summarily threatened in case he allows himself to be bribed (Athlst. v. 1, sec. 3); if in his office of judge he passes an unjust sentence (Edg. iii. 3); if he does not keep the proper court day (Edw. ii. 7, 8); if he does not collect the fine for refusal of justice (Edw. ii. 2); and if he neglects his duty in maintaining the peace (Athlst. ii. 26, pr. v. 1, sec. 2; vi. 8, secs. 4, 11). The frequent mention of the punishment for disobedience (*ofer-hyrnes*) and deposition in case of non-fulfilment of duty, mark the personal position of this powerful officer. Although with the ever-increasing importance of the office an eminent local man was generally chosen to fill it, and at times and in certain localities regard might be paid to the wishes of the county assembly, yet there is here even less appearance of an elective office than in the case of the Ealdorman.

In the official business of the Shir-gerêfa his financial duties and the management of details of business stand in the foreground. Whenever royal demesnes (Athlst. ii. pr.), folkland, usufruct, and other royal dues, have to be superintended in a county district, the Shir-gerêfa is the controlling official,

unless a more special administration has been organized. Without prejudice to the Ealdorman's office, he was always regarded as the responsible officer of accounts. The same intimate connection with the royal revenues brings the Shir-gerêfa also within the sphere of the military, legal, and police jurisdictions.

1. When the military array was called out, the first duty was to collect the fines for neglecting to appear, and money contributions for the equipment of the soldiers, which came in when the contingents were apportioned ("*Tributa expeditionalia*," Cod. Dipl., No. 362). In the whole business of equipping and apportioning the contingents the Shir-gerêfa acted as the Ealdorman's assistant. Where delay would be dangerous, he occasionally leads his troops in person against the invading pirates. For like reasons he heads the hastily summoned soldiery for the pursuit of peace-breakers (Athlst. vi. 8, sec. 4). The employment of the militia organization for police purposes necessarily required a local officer. In later times, when the Earl more and more retired into the position of an upper governor, the Shir-gerêfa, sitting with the Thanes in the county court, probably conducted the current business of the militia and police administration as completely and as regularly as he certainly did the legal business.

2. In the legal department the getting in of fines (Edw. ii. 2) and the confiscation of forfeited estates (Codex Dipl., No. 328, 1258) was without doubt the primary business of the Shir-gerêfa. A further duty was to carry out the various sentences of the court (Athlr. i. 4, pr. sec. 1; Cn. ii. 33).

In his presence contracts of sale and exchange bargains were concluded (Athlst. ii. 10; Edm. iii. 5). The Ealdorman and the bishop are the regular presidents of the great county court; but even here the Shir-gerêfa, according to the records, is the assistant of the Ealdorman (Codex Dipl., No. 765), and his presence in the capacity of financial officer is indispensable.

But we find him already in the older statutes as the sole justiciary of the king in the popular court, especially in trans-

actions touching fines and forfeits (Withr. 22; Alfr. 22, 34; Edw. i. pr.; Athlst. ii. 22). In later times, the more the Ealdorman is restricted to the military command of the greater provinces, the more entirely does the Shir-gerêfa become the regular leader of the Shir-gemôte, and down into the Norman times there exists a condition of things, in which the holding of the county court by the Shir-gerêfa is regarded as a time-honoured custom.

3. In the business of maintaining the peace, the gerêfa is again the coadjutor of the Ealdorman. He must in his shire "before all else undertake the responsibility that all keep the peace" (Athlst. vi. 10). Police functions especially are allotted to him, which would be hardly suitable to the Ealdorman in his high and princely position, such as tracking cattle-stealers (Athlst. vi. 8, sec. 4); taking steps against the harbourers of thieves (Athlst. vi. 8, sec. 2), the control over the completion of bargains of sale and exchange, etc. "If there be a man there who is untrustworthy towards the people generally, the king's gerêfa shall go forth and take surety for him" (Athlr. i. 4). As royal executive officer he had also to assist the Church in getting in its dues and in other civil matters (Athlst. i. pr., sec. 4; Edg. i. 3; Athlr. viii. 8, 32; Cn. i. 8). (2)

(2) As to the position of the Shir-gerêfa Spelman's Glossarium, under the word "grafio" contains abundant material, which is the basis of all the English traditional explanations of the subject (see also Kemble, "Anglo-Saxons," ii. c. 5, especially the list of names of the Shir-gerêfas in the eleventh century, Kemble, ii. 141–143). The disputed points are the following:—

1. As to the derivation of the word *gerêfa* (as of the German "graf"). The derivation from "grau," or "gravio" in the sense of *senior* has been set aside by Grimm. The derivation attempted by Grimm from "râvo," *tignum, tectum, domus, aula*, according to which it should mean a "*comes*," or "*socius*" (Deutsche Grammatik, ii. 736; Rechtsalterthumer, p, 753), is quite as far-fetched and incredible as that of Lambard from "gereccan" *regere;* and that of Kemble from "rôf" or "rêfan," *clamor, clamare, bannire, bannitor.* Spelman derives it from "reâfan," to rob, in the sense of the later feudal "distress" as applying to the collector of the royal fines. With this would agree the later usual form, "reeve," as would also the real position of the gerêfa, which is rendered into Latin by *exactor.* This corresponds also to the etymology of the word "Schultheiss," in Germany (see Max Müller, Lectures, ii. 231).

2. Whether, in addition to the Shir-gerêfa, there existed other principal officers of the shire, is a doubtful point suggested by the fact that in the statutes sometimes a "shîrman" is mentioned, as in Ina, cap. 8, where the shîrman or other judge (Dêman) is intended. In the Codex Dipl. an "Æthelwine scîrman" occurs (No. 761); but in another place he is called "Æthelwine Shir-gerêfa." In these same statutes

If the administration of the county in these points was centred more and more in the hands of the Shir-gerêfa, this must certainly be true, in a still greater degree, of the inferior local jurisdiction in the Hundreds. In the most prosperous period of the Anglo-Saxon kingdom, the Hundred Court was held twelve times a year as the common court for ordinary disputes between the freemen (Edw. ii. 8; Edg. i. 1; Cn. ii. 17). By degrees the more special obligations to be fulfilled by the Hundreds accumulate—to maintain the police control, to bring their members before the court, and to pursue thieves (Edg. i. 5; Cn. ii. 20; Hen. i. 8, sec. 2; Will. i. 22, iii. 3, etc.) It might have been supposed that, in view of this, each Hundred had a Hundred-gerêfa appointed by the king, but this is not anywhere mentioned in the records. In the "Constitutio de Hundredis" (Edg. i. 2, 4, 5), a "hundredes-man" is named, but in intimate connection with the tithing-man of the militia, and appointed for special police-business, and it appears that by this name a special officer of the militia is intended, who may be compared with the "chief constable" of later centuries. But on the other hand, where the presidents of the Hundred Assembly generally are referred to, the "Shir-gerêfa" is not definitely mentioned, but the "king's gerêfa." "I will that every gerêfa hold a gemôt every four weeks" (Edw. ii. 8); "that a gemôt be holden in every Wapentake, and that the twelve oldest Thanes go thither and the gerêfa with them" (Athlr. iii. 3). In the general regulations for magistrates, gerêfas are, as a rule, mentioned (Edw. i. 1; Edw. ii. 2; Athlst. ii. 26, iv. 7, v. 1, vi. 11). We can only conclude from such

occur the forms "scirigman," "scires-man," "scireman;" (Nos. 761, 732, 929, 972, 1288). By these names may simply be meant the Shir-gerêfa, as Kemble and Schmidt conclude; but it is also possible that there was a special "scir-man" for military organization, and for certain police functions, as an elective officer of the old order.

3. The opinion formerly current in England that the Shir-gerêfa was originally an elected popular officer, has no other foundation than the passage quoted above (Leges Edw. Conf. de Heretochiis, c. 32a), "*sicut et vice-comites provinciarum et comitatuum eligi debent:*" the style alone of which sufficiently designates it as expressing merely the opinion of the private author. The Anglo-Saxon accounts taken from statutes, documents, and historians all indicate a free appointment and deposition of the Shir-gerêfa at the will of the king.

language that the administration of the Hundreds was not thoroughly uniform throughout the country; as some Hundreds, and many districts combined with the Hundreds, had special magistrates. But apart from this, the official business of the Shir-gerêfa, his especial financial, legal, and police duties were so bound up with the Hundred Assembly, that he must have been the actual prefect of all Hundreds which were not exempted from his control. This is identical, too, with the state of things which in the Norman period we find to be the customary and ancient one. (2[a])

III. **Royal Gerêfas** for narrower districts and townships, and for special administrative purposes, in addition to the Shir-gerêfa, arose from the form which the royal rights and the territorial conditions had taken, all which have been described above (Chap. III. sec. 3).

Firstly, in Hundreds, and even in still greater sub-districts of a county, special magistrates might be appointed, as the royal gerêfa in the Thing of the five burgs (Athlr. iii. c. 1), which was a special district of Danish colonists, where he was even appointed to sit side by side with the Ealdorman. According to another principle, the great royal forest-districts led to the appointment of the Swân-gerêfas, who occur as early as Ecgberht's time (Codex Dipl., 219), but who in the later "Constitutio de foresta" of Cnut are the chief officers for the

(2[a]) Whether the Shir-gerêfa was the regular president of the Hundred Court, or whether there were special under-magistrates in the Hundreds, cannot be categorically decided. But the negative proposition can be maintained, that the very frequent mention of the Hundreds and their gemôtes in later times must have led to the mention of the Hundred-gerefa, had such an officer belonged to the constitution of the Hundred. Doubts might arise, in view of the large number of Hundreds, in each of which a single man could not hold a court every four weeks, but in the majority of counties the number was so moderate that there would be no impediment. In Kent the numerous small Hundreds were united into "Lathes" for the administration of justice. Later times prove that the sittings of several Hundreds were generally taken together, and held at one and the same time; and in like manner later conditions of things show us that the sheriff could appoint substitutes, on his own responsibility. The legal collections of the Norman period do not afford reliable proof on this question. In the Leges Hen. i. 8, sec. 1, we read, "*Presit Hundredo unus de melioribus et vocetur aldremannus;*" 91, sec. 1, "*Aldremannus hundredi.*" An Ealdor of a Hundred only occurs in Edg. iv. 8, 10, and evidently signifies the magistrate, and not a particular title of office.

administration of forests. The gerêfa system extends also to townships; Burh-gerêfas, or simply gerêfas, are found in towns which had formed round a burg, on old demesne lands, folkland, or under special royal protection; a Port-gerêfa in towns which, as commercial centres, were of special importance for the collection of the royal dues, as in London and Canterbury. In London he has the position of a Shir-gerêfa. The royal letters were addressed to "the Ealdormen, Bishop, and Port-gerêfa;" and high officers of the royal household, as well as great Thanes, are mentioned as holding these lucrative posts. A Wic-gerêfa is found as royal magistrate in smaller townships. In many considerable towns the royal magistrate of the Burh-gemôte retained even in later times this less pretentious title. Even in London in the seventh century the king's Wic-gerêfa is mentioned, whose place was in later times taken by the Port-gerêfas.

A similar system of gerêfas existed, as we have mentioned, for the great private landed estates. Bishops, Ealdormen, and greater and lesser Thanes had to raise dues from their estates, to settle the disputes of their dependants, and to take upon themselves the responsibility in the numerous proclamations of the military array, and of the maintenance of the peace. Such lords' "Tungerêfas" might be simple bailiffs. In greater townships, and where an extended jurisdiction (*saca et soca*) had been accorded them by royal grant, they might actually have the importance of a royal Wic-gerêfa. The term "socn-gerêfa," however, only occurs once in the old Corporation Statutes of London. The landed Thane, too, is himself regarded as the responsible wielder of an official authority (Athlst. iv. 7). (3)

(3) As to the special gerêfas for districts, towns, and administrative functions, see Kemble ("Anglo-Saxons," ii. c. 5, pp. 144–154).

The Burh-gerêfa is less frequently mentioned in statutes and records than the importance of the Burh-gemôte would lead us to expect. Some names of gerêfas in royal Burhs are given by Kemble (ii. 146). A Port-gerêfa is met with in London, Canterbury, Bath, and Bodmin (Kemble ii. 148). In London the two Port-gerêfas appear in early times in a certain connection with the Shir-gerêfa of Middlesex (in the so-called *libertas civitatum*, appendix, xxiii. 4).

The Wic-gerêfa is met with also in

The universal system of royal gerêfas pervades the Anglo-Saxon administration in all directions, and forms a remarkable feature in it. From the days of Ælfred numerous *judices, præfecti, præpositi,* are appointed, all of which names are but Latinized expressions for a word of wide signification —"gerêfa." The body of these officials forms a uniform whole, as is shown by the fact that in Eadgar's time the King confirms the appointment of the whole body of his father's officials (Edg. iv. 2, pr.). The financial rights and the general development, of the royal powers had led to this system of royal appointments. The Anglo-Saxon Chronicle makes King Withred say at the National Assembly at Baccanceld in 694: "It is the king's business to appoint Eorls, (?) Ealdormen, Shir gerêfas, and Judges" (Monum. Hist. Britt. i. p. 324). In an Anglo-Saxon record (Cod. Dipl. 996) we find the same: "*illius autem est, comites, duces, optimates, principes, præfectos, judices sæculares statuere.*" This record is, indeed, not genuine, and betrays the hand of a cleric; but, like the most of these documents, it is of very ancient date, and expresses the conceptions which were regarded as traditional. The expression "royal Thaneship" embraces frequently in this sense the sum total of magisterial offices. Offences of officials are generally to be visited with fine and loss of thegnship ("*thegenscypes et omni judiciaria dignitate privatur,*" Leges Hen. i. 34, sec. 1). In close connection with landed property this thaneship spread over the whole country, and supplanted the popular offices and popular elections of the ancient constitution. Of elections in the modern sense of the term there is no reliable trace to be found, neither in the imperial nor in the county administration (Palgrave i. 118).

Winchester (Chr. Sax. 897; Schmid, Glossaium, 598).

The private magistrates of the Bishops, Ealdormen, and Thanes may also include the humblest bailiffs. The gesithcundman, who (Ine, 63) is described as travelling about "with his gerêfa, his smith, and his nurse," certainly took with him no magisterial officer, but merely a menial servant. That the landowners might be represented by their gerêfa in the royal court in taking oaths in certain special cases is recorded already by Athlr. i. sec. 1. Much that is incapable of proof touching the election and business of the lords' gerêfa is narrated (as usual) by Anstey, "Guide to Constitutional History," p. 125.

The fully developed Anglo-Saxon political State is a joint creation of great landed interests and a royal prefectural system, scarcely containing any of the characteristics of a Germanic constitution such as Tacitus describes. The actual State is embodied in comparatively few persons, namely, the Bishops, Ealdormen, and Shir-gerêfas, appointed by the King. The local administration ramifies into a system of gerêfas in narrower circles, interwoven with a similar system of manorial magistrates. A lowering of the political importance of the freehold tenants, of the landless freemen, and of the whole labouring population in consequence, is unmistakable. But the constitution of the courts modifies this character. In the Hundred Court, and even in the Manorial Courts, the passing of sentences is not an individual act of the magistrate, but is a determination of the freemen acting in the capacity of judges and compurgators. In the County Court the royal magistrate is surrounded by still more influential Witan as Judges. Similarly the county administration in military affairs and the maintenance of the peace is carried on in active co-operation with the Thanes of the county, and probably too with deputations from the Hundreds and analogous districts. On a higher level the King administers justice in the Witenagemôte with the counsel and consent of still more powerful prelates and great Thanes. That this strong aristocratic element still co-exists with an universal system of royal magistrates is explained by the general composition of the State. There existed a number of powerful landowners, but their landed interests were not concentrated at one point. Originally there were no great estates, which might be compared to the "*possessiones*" which existed in the old Roman provincial soil. In the territory of the small kingdoms of former days a numerous middle Thanehood had grown up with an average possession of five hides each; but there were no separate great estates, whence a territorial supremacy could have proceeded. After the union of the kingdoms the royal possession and the royal power towered so far above the most powerful great Thane as to render it practicable to

maintain a central administration by means of governors and appointed magistrates. But on the other hand the Prelates and the Thanes were, as a body, so numerous, so richly endowed with estates, and so firmly established in their landed rights, that as a class they almost engrossed the magisterial offices. In harmony with this condition of things is the concentration of the central authority, "the King in the Witenagemôte" as an assembly of landlords invested with offices and officials possessed of land (below, cap. VI.). Its composition is grounded on the right of appointing, of summoning, and of granting, which the King exercises within the army, law, police, and Church constitution; and which again ministers to the united influence of Prelates and great Thanes at court and in the Witenagemôte. The preponderance of these families, often closely connected with each other, compels the King more and more to fill the important offices "with their assistance," and thus at an early period a state of things is established in which the power of the great landed interests does not show itself in the form of concentrated feudal small states, but in a corporate form with a controlling influence upon the exercise of royal powers.

CHAPTER V.

The Anglo-Saxon Church.

The conversion of the heathen Anglo-Saxons by resolutions of the King in the National Assembly had led to the foundation of a bishopric in each of the several kingdoms. Towards the close of the seventh century these bishoprics were united under an Archbishop Theodore, upon whom the Pope's choice had fortunately fallen, and became in consequence an element of centralization which wrought powerfully in preparing the way for the subsequent union of the kingdoms. The Church thus bound together was and remained a national Church, of an essentially different nature from that existing among the Britons and in Roman countries. Her origin, her institutions, and her establishment were the free act of the organized powers of the State. Her clergy belonged, with few exceptions, to the native families. Her constitution did not originate in an adoption of foreign institutions, but in national necessities. In this Church also, the wise and the ignorant, the teacher and the disciple, certainly stand in relations to each other, to which the organization of the militia, the courts, and the maintenance of the peace are inapplicable. As a school for the people, the Church must at all times be organized from above downwards; she performs her functions only by means of officials who are dedicated entirely and solely to her service, and independent of birth and property. The union of the kingdom only affected the constitution of the Church so far as to gradually remove undue inequalities in the formation

of the dioceses, and to bring the ecclesiastical districts into as much harmony with the division into shires as appeared necessary for a common transaction of spiritual and temporal affairs.

I. **The Institutions of the Church** comprise the three gradations next mentioned.

1. The *bishoprics*, which originally were identical with the territory of the separate kingdoms, remained unchanged in the smaller ones, whilst in the greater kingdoms of Wessex and Mercia the administrative principle of division into shires led to a corresponding increase in the ecclesiastical districts by a division into eight dioceses. And so at the close of the Anglo-Saxon period there were in existence, with some changes, seventeen dioceses, the majority of which began as early as the time of Theodore to unite and form provincial synods under the direction of the Metropolitan of Canterbury. A second archbishopric for the group of northern dioceses became consolidated after many vicissitudes, but it was unable, in the disordered condition of affairs in the north, to attain, either externally or internally, to perfect equality with Canterbury. Every Archbishop and Bishop is, according to Anglo-Saxon ideas, the original holder of ecclesiastical authority. In temporal matters, too, he was "to take part in the sittings of the court, adjust differences, and restore peace in conjunction with the temporal judges, prevent wrong-doing in taking of oaths and in trials by ordeal, connive at no unjust measure or false weight; in short, to keep watch over the maintenance of spiritual and of temporal law." (Thorpe, "Institutes of Ecclesiastical Polity," ii. 312.) (1)

2. The *monasteries* and religious corporations were of special

(1) As to the formation of the Anglo-Saxon Church, see especially Palgrave, "Commonwealth," cap. xi.; Kemble ii. c. 8; and Henry Soames, "The Anglo-Saxon Church" (1845-6); Lingard, "History of the Anglo-Saxon Church" (1845); Dugdale, "Monasticon Anglicanum" (Edited by Calley, &c., London, 1817); Lappenberg, i., pp. 185-195. ("Die Kirchliche Geographie der Angel-Sächsischen Zeit.") The historical grouping is as follows:—In the little kingdom of Kent (1) the archbishopric of Canterbury was and continued to be the mother-bishopric of the whole of England, besides which, in quite early times, (2) the bishopric of Rochester had arisen. For Essex arose (3) that of London; for Sussex (4) Selsea, in later times Chichester.

importance in this epoch. A monasterial institution was the first need of Christianity, as a gathering-place and shelter for missionaries, teachers and scholars. The exigencies of sustenance, personal safety, and mutual help in their mission-work, kept on foot for a long time this mode of living in common; the late origin and very diverse organization of the parish Churches was favourable to it. The number and endowment of monasteries, and especially of nunneries, is ever on the increase. At an early period men and women, even of royal lineage and from the families of the great Thanes, show a predilection for entering upon monastic life. The clergy of the great cathedral churches retain in later times their original monasterial connections and institutions, according to which the prebendaries continue to bear the title of "monks." According to the conditions of society of those days, the foundation of superior schools could be effected only by a union with the members and possessions of such corporations; just as the beginnings of charitable

In East Anglia (5) the bishopric of Dunwich in Suffolk was first founded, from which again for Norfolk (6) that of Elham, later Norwich, was separated off. For the great territory of Wessex (7) the bishopric of Dorchester was first founded, from which (8) that of Winchester was severed; then was further founded a third (9) bishopric at Sherborne, later removed to Old Sarum and then to Salisbury. From the last named again were separated off (10) the bishopric of Wells, and (11) of Kirton, afterwards at Exeter. The administrative principle of the shires, according to which these dioceses contained one, two, or three counties each, was here the rule. In Mercia from the (12) head bishopric of Lichfield (in later times Chester and later Coventry) were severed the bishopries of (13) Worcester, (14) Hereford, and (15) Lincoln. The northern kingdom of Deira had retained as its chief bishopric, that of York (16), which extended also over Bernicia, and after the formation of the great kingdom of Northumbria, stretched still further. As a separate bishopric, arose that of Lindisfarne (17), later Durham. A considerable portion of the great diocese of York went over to the Scotch Bishops. In an anomalous position stood the Bishop of the Isles of Sodor and Man, who after the Norman period was subject to the Archbishop of Drontheim, and came later under private patronage. There is here to be found no connection of any sort between these and the bishoprics of the old British Church. (Palgrave, i. 152–154.) The abbacy of Ely was as late as the reign of Henry I. first raised to the rank of a bishopric; and in 1109, the bishopric of Carlisle was founded for Cumberland. The four bishopries of Wales, by the conquest of the country some centuries later, were incorporated with the English Church system. The formation of the offices here was exactly opposite to the process of formation in the State —first the formation of the Bishops' sees, then that of the parishes; in a much later period that of the archdeaconries and rural deaneries. The archdeaconries are associated with the county districts, and the rural deaneries with the Hundreds of later times.

and pious foundations could only gain stability and endurance in the permanent conditions of property afforded by such corporations. "In the neighbourhood of the cathedrals were gathered together the maimed, the lame, the blind, the homeless and friendless, to be fed, clothed, and cared for for God's sake" (Kemble, ii. 440). This may explain the disproportionate favouritism shown to these corporations by the most enlightened monarchs, such as Ælfred the Great, especially under the heavy visitations of the Danish period. The Anglo-Saxon period concludes with a great number of permanently endowed monastic cathedral corporations, irregularly scattered throughout the kingdom, and with very unequal, and in some places over-wealthy possessions. (2)

3. The foundation of *parish churches* in England took place slowly and imperfectly. For a great length of time, according to Bæda, the bishops still wandered about their dioceses with their assistant clergy; and even in the middle of the seventh century Saint Cuthbert journeyed from village to village. But from the days of Archbishop Theodore the creation of settled parishes began in greater numbers, slowly extending from the southern parts of the country towards the north; endowed often with parcels of land by generous Thanes, they became after the introduction of the system of church-tithes more uniformly enriched by the tithes of their

(2) The monasterial foundations (Kemble, ii. c. 9) were originally promoted by the customs of the early missionaries. The clergy lived in communities, even when they were not monks, and followed the rule of the Benedictine or some other order. Under the protection of the kings this spirit of community, especially in the highly honoured nunneries, assumed a national character. The real need of the times we must estimate according to the views of an Ælfred, and not from the later and changed position of affairs. Asser tells us that Ælfred was wont to dedicate a full half of his royal revenues to ecclesiastical purposes: of this he assigned a fourth to the poor, a fourth to the two monasteries he had founded, another fourth was set apart for the school founded by him, and the remaining fourth for the neighbouring churches and monasteries and their ministers. Both spiritual and temporal nobles spent considerable sums in charity, in its primary signification; a portion of the booty made in war, and a portion of the fines payable to the Church, was also ordered to be paid to the poor. All such foundations, however, found no stability in the system of temporal administration, for such contributions were speedily spent and forgotten; hospitals and almshouses belonging to the monasteries and cathedrals formed just those permanent institutions on which the system depended. (Kemble, ii. c. 11.)

parochial districts. The Canons of Archbishop Ecgberht (Excerpta Ecgberhti, Thorpe ii. 100) show us what the early Church of those days aimed at. The parish church was to be endowed with a hide (*mansus*) of land, and this hîda should remain free from all public burthens, whilst all property beyond this amount should be subject to manorial dues and State burthens. The laws of Eadgar and Cnut of a later period contain the rule that every landowner may endow a church situate on his Bôcland, with a third of the tithes, provided there be a graveyard united with it; where there is no graveyard, the tithes are payable as before to the "parent" Church, and a new income is to be provided by its founder for the chapelry.

These attempts, similar in character to the ordinances of the Emperor Louis (Pertz ii. 626), were, however, only partially successful, and even at the close of the Anglo-Saxon period the endowments were somewhat scanty compared with the possessions of the cathedral churches and abbeys. Meanwhile, the Church income, which was at first centralized, becomes more and more distributed amongst and firmly attached to the bishops' sees, monasteries, and parsonages. A settled endowment of the parsonages became the rule in the ninth century. In Domesday Book an "*Ecclesia sine terra*" is a rarity. From the manner of the foundation there resulted an extensive right of patronage over the benefices. The Norman Domesday Book, in which the list of them is imperfect, specifies hardly more than 1700 churches, endowed with parcels of land of from five to fifty acres, and showing a very unequal distribution of the ecclesiastical benefices in the various parts of the kingdom. (3)

(3) As to the nature of the ecclesiastical benefices, Domesday Book alone gives us reliable information (Ellis, Introd. i. pp. 286, 295). Glebes of more than 50 acres (as one of 83, one of 100, and another of 120 acres of pasture land) are solitary instances; on the other hand, a church without land is also a rarity in the great register of land. But churches without land appear to have been omitted, owing to the original object of the book. In the legislation, the continual increase in the number of parish churches is visible in the distinction of various classes. In a principal church (*hlâfod mynster*) breach of the peace is visited with a penalty of £5; in ordinary churches of 120 shillings; in still smaller of 60 shillings, and in chapels of 30 shillings

These institutions of the Church, as regards her property as well as her ministers, are firmly bound up with the secular state.

II. **The Property of the Church** attained an extent which, at the close of the Anglo-Saxon period, towers far above the importance of the royal revenues. Intellectual and industrial labour alike require property for their maintenance and development; but intellectual labour has been always compelled to associate itself with the existing system of property. In the Middle Ages it was obliged to acquire great landed estates in order to keep on terms of equality with freehold owners. The amount of Church property, as a whole, long retained that relative importance which the intellectual life, centred in the Church, might well claim, in comparison with military life or industrial pursuits. The separate elements may be grouped in the following order:—

1. The *landed property* of the Church had to maintain itself on an equal footing with the fully secured allodial estate, at a time when such property was a necessary condition of full legal capacity and equality. But it is an old experience that recently converted races know no bounds in their liberality towards the Church. Following the example of King Æthelbert, who bestowed his palace with its lands upon St. Augustine, the Anglo-Saxon kings and magnates also made rich gifts. The manifold Anglo-Saxon records lead one to suppose that almost every princely personage bestowed some such gift on departing this life. A person entering a monastery not unfrequently brought his whole fortune with him; the children of distinguished parents brought at least a donation of lands. Recovery from severe illness and escape from disasters, as

(Athlr. viii. 5; Cn. i. 3, secs. 1, 2; Hen. 79, sec. 6; App. iv. 3). The maintenance of the parish church afforded the first reason for the participation of the community in the control of the Church property. The analogy of the parochial system of northern countries and of the later rights of the parishioners in England justify the conclusion that the Saxon parishioners also participated to a certain degree in the management of the Church property which had been formed from their contributions. The Church of the later Middle Ages, when her pretensions were at the highest, would scarcely have recognized such participation, had it not been founded on ancient custom.

well as joyous events, were commemorated by donations, which the clergy, whose co-operation at the making of wills was indispensable, commended to the consciences of rich sinners agitated by the fear of death. Even the severe losses which the Church experienced through the destructive frenzy of the Danish pirates were soon made good by donations from converted Danish magnates. According to the manner of property in those days, to landed estates were attached reserved dues, services, and rights of protection over tenants. Profitable rights of this description might also be the immediate subject of the bounty. Royal donations especially include tolls and market dues, forests, harbours, fisheries, mines, and rights of pasturage. There are further attached to great landed estates, the magisterial rights which had become extended by grants, and the whole lordship over the soil in its Anglo-Saxon conception. Thus arose the landed property of the Church, almost continually growing and increasing, until, in the case of many cathedrals and monasteries, it was equal to that of the temporal great Thanes; and compared with it, the single parcels of land belonging to the parish churches bore about the same proportion as the small yeoman freeholds of that time bore to the lordships of the *Thaini regis*. (a)

2. The *payment of tithes* was almost as important for the permanent and uniform endowment of the ecclesiastical institutions as the possession of landed property. As in the whole

(a) The landed property of the Church is dealt with by Kemble, ii. c. 10. To give an instance of the unequal distribution of landed property, it will be sufficient to mention that the district of Chilcombe (a part of the possessions of the bishopric of Winchester) is reckoned at 100 hides (Cod. Dipl. 642). However, such a concentration of estates, which might have led to separate territories was just as little possible with ecclesiastical estates as with temporal magnates, from whose grants they principally arose. It is true that King Withred of Kent and Æthelbald of Mercia declared their wish to free the ecclesiastical estates within their realms from "temporal burthens, labours, duties, and contributions," but hereby only burthens attached to land were meant, and it is expressly declared that the three common burthens, "*expeditio exercitus, burgorum constructio, pontium refectio*," are not included. Few grants to the Church can be cited without the reservation of these common burthens, which later jurisprudents have styled the "*trinoda necessitas*" (Palgrave, i. 156, 157, 160, 161).

of Christendom, so in England as early as the end of the eighth century, the united exertions of the clergy led to a recognition of the right to tithes by the National Assemblies of Mercia and Northumberland. A decided legal recognition was first made in Æthelstan's "*Constitutio de Decimis*," since which time the temporal power agreed likewise to these taxes being raised by the royal gerêfas. One third part of the tithes was to be expended on repairing the church, a second for the ministers of God, the remaining part for God's poor and for needy labourers (Athlrd. viii. 6). Nearly every subsequent reign confirmed afresh the legal liability to tithes with the assent of the Witan. The Church accordingly gained a right of direct taxation much earlier than the temporal State. (b)

3. Besides the tithes there were *periodical contributions* of minor importance, as burial-service fees, candle-dues, and plough-alms, contributions which, at first depending on liberality, became local customs, and were at last recognized in the decrees of the National Assembly. To such belongs also a Church rate (*Ciric sceat*), which was to be paid on St. Martin's day by every free household, and regulated in a certain proportion to the produce of household and farm; but a general carrying out of this measure, in spite of legal recognition, was not achieved, and in Norman times it is only met with as a customary tribute paid by certain individual estates. As occasional sources of income may be mentioned the numerous gifts made by believers, consisting of movable goods, such as crosses, rings and jewels, provisions, etc.;

(b) The Church tithes are first mentioned in the written law in a synodal decree of the year 786 (Selden, c. 8, sec. 2), which proves their confirmation by the temporal power by decrees of the kings of Mercia and Northumberland in their National Assemblies. Liability to tithes is next recognized in the law of King Eadward and Guthrum about the year 900 (E. et. G. c. 6), briefly mentioned in Athlst. iii. 1, but at full length in an ordinance respecting tithes (Athlst. i. secs. 1–5) with two rather different texts. The ordinance speaks only of the "assistance" of the bishops, and is addressed to the gerêfas as an official notice. Later recognitions are to be found in Edw. i. 2; Edg. ii. 1, 2, 3; iv. 1, secs. 3, 4; Athlr. v. 11; vi. 17; vii. 1, secs. 2, 4, 7; viii. 6–9, 14, 15; Cn. i. 8, 11; Edw. Conf. 7. 8. That a third of the tithes is to be expended on repairing the church is repeated by Athlr. vii. 6; but the fines payable to the Church shall also be used for the same purpose (Athlr. v. 57), that the bishop especially (Edm. i. 5), and every one generally, should contribute to the repair of the church, by Cn. ii. 65.

which, in the wills of the Anglo-Saxon magnates, are extended to presents of whole herds of horses, oxen, sheep, and pigs—"*pro salute animæ.*" (c)

III. **The Political Position of the Ecclesiastical Ministers** shows a more complete and closer union between the Church and the laity than in most countries of the continent. Whilst Christianity in other countries took its rise in the poorer classes of the population, in England the conversion began its work with the kings, their households and followers, their Witan and Comites, and spread downwards from them into the communal and family life of the people. It was natural, therefore, that the result should be a close connection with family, community, and government. The clergy belonged to the nation's "family-life," for, from the very first, they were taken from all classes of society, from the king's son down to the bond-theow. Monastic life, with its strict observance of the rules of the order, certainly demanded the sacrifice of family ties; but, on the other hand, the secular clergy were, and continued to be, to a great extent, in the married state. The injudicious zeal of Dunstan, indeed, endeavoured to bend even the secular clergy under the rules of the order. In a time of great abuses and a threatened alienation of the Church, the clergy should belong exclusively to the spiritual profession. The force of custom was, however, so strong in

(c) Among the small periodical contributions, the Ciric-sceat has been the subject of a prolix discussion, which is connected with the disputed position of the "Church-rate" of to-day. Its nature has been nowhere exactly described, yet there are many reasons for believing that it was intended to be a gift of the first-fruits of the field after the model of the Mosaic law. The mention of it in the statutes is exceedingly frequent (Ine, 4, 6; Edg. ii. 2, 3; iv. 1; Athl. vi. 18; vii. 4; viii. 11; Cn. i. 10; ii. 11). The collection of it was especially inculcated upon the gerêfas (Athlst. i. 4), under threat of excommunication (Edm. i. 2). It can therefore hardly be denied that the legislation intended to recognize a general Church contribution, but that its levying found an obstinate resistance in the opposition the yeomen especially showed towards it, and was accordingly, in spite of all ordinances, only partially carried out. Kemble (ii. 460, suppl. D.) endeavours to maintain a thoroughly fictitious view. A good discussion of the question is found in Schmid (Glossarium, 545–547). From the success that attended their imposition, the innumerable absolution moneys for fasts and penitences may be included in the periodical Church tributes. From the multiplication of these means of grace the penitentiary books of this period give an extraordinary picture of the abuse of an idea originally proper and moral.

the national Church that a score or two of years later the ecclesiastical *régime* was not materially changed, and celibacy did not become an established rule of the Anglo-Saxon Church. The clergy belong to the civil community through the liability of their corporate estates to the payment of common burdens. With unimportant exceptions, the deeds of grant even to the most favoured monasteries declare their ever-recurring "*trinoda necessitas*"—the perpetual liability to "Brycgbote, Burhbote, and Fyrd"—to which are joined many other services reserved to the King; whilst on the other hand the Church participated in all rights and privileges of landed property. Hence was preserved a feeling of common interests and rights bound up in a close bond of union. The Canons show that on the part of the Church there was no attempt to obtain fundamental immunities in this respect, even though a monastery here and there endeavoured in its deeds of grant to acquire some special benefit. As an established principle, the clergy remained subject to the secular authority, viz. the royal military, legal, police, and finance control; subject, however, to the following general rules:—

1. The obligation of the clergy to military service was not abolished by any Anglo-Saxon statute, although no compulsion was used towards the higher *ordines*. The latitude of administrative arrangement of the militia in the County and Hundred Assemblies readily allowed of substitution; the interests of neighbours, however, took care that the ecclesiastical estates furnished contingents for the national defence as nearly as possible *pro rata*, and that the favour shown to the Church should at all events not increase their own obligations. (1)

(1) Immunity from military service was never directly stated (Palgrave, i. 156, 157). We find in times of danger the higher clerics frequently amongst the warriors and amongst the slain; yet a personal summons of the clergy is never spoken of. An obligation to furnish soldiers according to the proportion of ecclesiastical property is expressly mentioned, and sometimes even the customary number of the troops, as in a large grant to a monastery, "*expeditionem cum duodecim vasallis et cum tantis scutis exerceant*" (in 821; Cod. Dipl. 272). To look to this was the duty of the Shir-gerêfa.

2. The judicial duties of the clergy were as follows: in a dispute with the laity they must seek justice in the Hundred and Shir-gemôte, to the criminal jurisdiction of which they were subjected, equally with the layman. Clergy appear amongst the judging Witan (Alfr. 38, sec. 2). They appear especially active in the administration of oaths, and in conducting the ordeals (Edw. Conf. c. 9). Clerics perform the functions of notaries in cases of contract, grants, and wills, "*quoniam tabellionum usus in regno Angliæ non habetur*" (Matth. Paris, Hist. Hen. iii.), and appear also as taking depositions (Edm. iii. 5; Athlst. ii. 10); under their superintendence marriages are contracted (App. vi. 8). They are consulted as arbiters and councillors in actions at law. They are employed everywhere as clerks of the court. Even the office of Shir-gerêfa was, in certain cases, filled by clerics, and if the ecclesiastical canons in general forbid their exercise of that office, it is only a proof that such an occupation was legally permissible. A privilege is accorded the clerics only in the case of taking of oaths, in which the application of the ordinary principles would have led to hardships; but here at the same time the special credibility of a servant of God was taken into consideration. This purgation by oath was regulated and facilitated by the passing of special laws (Athlr. viii. 15). Of more importance than such moderate favours, appears the peculiar legal jurisdiction, which was formed in the interests of the Church, *in causis ecclesiasticis*, and for clerical delinquencies. This was without detriment to the secular legal jurisdiction, and only applied to the new relations which arose from the ecclesiastical ordinances, and which could not be considered as suitable objects for the judgment of the national courts in the form they then had (Edw. et G. 12; Cn. ii. 48, 53). Beyond this an exemption of the ecclesiastics from the secular judicial jurisdiction was never established during the Anglo-Saxon period. (2)

(2) As regards jurisdiction, Kemble (ii. 378) rightly remarks that the numerous precautionary measures contained in the statutes as to the manner of conducting law suits by clerics afford a complete proof of their subjection to the secular jurisdiction, as an established principle. (He cites

3. The principle by which they were subjected to the secular criminal jurisdiction brought the ecclesiastics also under the police jurisdiction of the Crown. The duty of maintaining the peace was extended naturally and particularly to clerics. On their landed estates they were responsible for their tenants, servants, and dependants, with all the strict obligations that later legislation imposed for the maintenance of the peace. From the system of special peace proclamations, there resulted a further co-operation of the ecclesiastical and secular authorities to secure the peace of ecclesiastical persons, possessions, and seasons, but this was founded upon the "King's peace" (Will. i. 20). (3)

This universal interweaving of the clergy with the secular community led further to their employment in the offices of the middle and higher grades of the administration. In the County Assembly the Bishop, Ealdorman, and Sheriff preside together, but with this proviso, that matters of a purely ecclesiastical character are generally determined separately. Under these circumstances the Bishop could also take cognizance of purely secular matters, such as the control over weights and measures, the rules of inheritance, and other affairs, which appear in later times in England as remarkable extensions of the ecclesiastical jurisdiction.

Athlr. 18, 19; Athlr. viii. 19-24, 27; Cn. i. sec. 5; ii. sec. 41; Hen. i. 64, sec. 8; 5, sec. 7 *et seq.*; 57, sec. 9). Their endeavours to gain immunity from the secular jurisdiction can be perceived, however, in the following points. In disputes of the clerics among one another, the Church in early times insisted that the parties should refer the matter exclusively to the ecclesiastical superior (Canon, Edg. 7). The priest found guilty of murder was deprived by the ecclesiastical authorities of his priestly consecration, and handed over as a layman to the criminal jurisdiction (Alfr. 21; Athlr. viii 26; Cn. ii. 41). Clerics were subject, in addition to the fines or penalties of the secular authorities, to a special Church penalty (Edw. et G. 3; Athlr. viii. 27; Cn. ii. 5, sec. 3). In the case of capital offences they were to be confined in prison, until the sentence of the Bishop had been passed (Edw. et G. 4, sec. 2; Cn. ii. 43). But a recognized ecclesiastical court is not found until the Norman period (Leges Will. I. sec. 4; Hen. i. 57, sec. 9).

(3) In the province of maintenance of the peace, the express duty was imposed on the Bishops of restoring order, and, in conjunction with the secular judges, of preventing wrong ("Institutes of Eccles. Polity, Thorpe, ii. 312). The Bishops enjoy a special right of asylum in analogy to that of the Ealdorman. In addition to the King's peace the Church-peace is especially mentioned as God's command (Athlr. v. 10, 21; vi. 13, 26); and is even set above the King's peace (Cn. ii. 1, sec. 1; App. iv. 1, 31).

As the support of the ecclesiastical authorities is a duty of the Shir-gerêfa (Athlst. i. pr. sec. 4; Edg. i. 3; Athlr. viii. 8, 32; Cn. i. 8), so also it is made the Bishop's duty to superintend and support the Shir-gerêfas. The punishments for disobedience inflicted upon the gerêfa who neglects his official duties, or delivers an unjust sentence, are to be enforced by the Bishop (Athlst. i. 26; Edg. iii. sec. 3). It is not clear whether, and if so how far, these divided official functions, which mutually acted and reacted on each other, extended downwards into the Hundreds. But upwards they meet in the general National Assembly, in the appearance of the Bishops and greater abbots in the Witenagemôte among the King's Thanes, of whom they always take precedence.

The bringing of the clerics under the duties of the community led immediately to ranking the clergy according to the class relations of those times. As in the Anglo-Saxon thaneship public duty and office combine with possession of property to form a class privilege, so do they also among the higher ranks of the clergy. In the civil State, property leads to office; in the ecclesiastical, office leads to property, and places the Bishops and greater abbots upon an equality with the great Thanes, and the beneficed clergy with the ordinary Thanes of the county. The equalization of the Bishops with the Ealdormen—that is, with the highest dignitaries of the civil State—was brought about with completeness, and knew no exceptions. This was done in the matter of the Weregelt (App. vii. 2. sec. 3; Hen. i. 68, sec. 6); of the compensation for murder (Edw. Conf. 12, sec. 5); of the Bishop's Borg and Mundfyrd (Alfr. 3; Cn. ii. 58; App. iv. 11); of the Burhbryce (Ine, 45; Alfr. 48); of the gage of battle (Alfr. 15; App. iv. 12); the Bishop's right of asylum (Athlst. v. 4; App. iv. 5); and the punishment for disobedience (Hen. 35, sec. 1; 87, sec. 5). In the same manner the position of the priest as "Mass-thane" was in word and deed established by law. He is worthy of the rights and the Weregelt of a Thane (Athlr. v. 9; vi. 5; viii. 28; Cn. i. 6, sec. 2). The Weregelt was fixed among the northmen alike

for the Mass-thane and the secular Thane at 2000 thrymsas (App. vii. 2, sec. 5), and in proportion to it was the higher value of the priest's oath (Wihtr. 16, 17, 18; App. vii. 2). The amount of the Weregelt, however, was a matter of dispute (Dialogus Ecgb. 12; Thorpe ii. 92), the later opinion being that it was decided by birth-rank (Hen. i. 68, sec. 3). The lower orders of clergy had in the scheme of penalties the ordinary position of the *liber homo* or ceorl.

The National Assembly, finally, forms the central point in which the civil State becomes bound up with the ecclesiastical. Under the personal direction of the King, affairs of ecclesiastical polity were here in the first place discussed mostly by the Prelates exclusively; but all the secular decrees of the so-called Legislature of this time were framed by Thanes and Prelates in common. The profession of the Church forms herein a counterpoise to the preponderating influence of property. In the decrees of the National Assembly this co-operation of the clergy is as perceptible in its leaning towards the side of humanity, as the governing power of the kingship is seen in its defence of the liberty of the subject. This periodical personal meeting of the King with Prelates and Thanes kept alive the idea of a final unity of civil and ecclesiastical authority in human affairs. The two powers strove, by harmonious co-operation, to realize the higher calling of the State. The ever-renewed and ever-enlarged protection which the royal power bestowed to the Church was requited by the clergy by repeated admonitions to respect and obedience to the sacred and inviolable person of the King, "the hallowed lieutenant of Christ," as he is called in a Saxon homily, the "*Christus Domini*," as an ecclesiastical assembly at Cealchyth, in 785, styles him. In conformity with this the secular laws regard the King as Christ's representative, "Cristes gespelia" (Athlr. viii. 2, 42), as the "*vicarius Summi Regis*" (Edw. Conf. 17). Even Ine of Wessex calls himself "mid Godes gife West Seaxena Cyning" (Ine pr.). On the other hand, kings, whose aim was the civilization of their people, the introduction of science

and art, the peace of the realm, and improvements in the administration, were obliged to foster the Church and obey her judgment and her counsel, as was done by Ælfred and Charlemagne.*

The Anglo-Saxon Church was certainly not a perfect expression of the doctrines of the Holy Scripture, but a form of Christianity, with a strong admixture of superstition and formalism. Of course the worship of saints and relics, submission and liberality towards the clergy, due observance of imposed penances and fasts, were her chief doctrines, and for these ignorance, superstition, and an evil conscience afforded more scope than for any other doctrine. But the Church existed, and existed as a great moral power, in a period in which physical strength and possession of property were almost the only recognized forces. She contained within her that kind of Christianity of which the times were capable; just as the secular State embodied that idea of liberty which the times could understand. This Christianity, beyond all dispute, had blended together the Saxons, Angles, and Jutes of the sixth century, and welded them into one peace-loving and law-abiding people, had humanized their manners, encouraged habits of industry, stamped upon all the institutions of the community a milder and kindlier character, had elevated the intellect, and produced in men like Bæda and Alcuin

* The number of the clergy, especially of the inferior orders, and of the monks was very great. The peaceful inclinations of the Anglo-Saxon population, after they had become firmly settled, and had devoted themselves to the industrious cultivation of the soil, the disappearance of the adventurous spirit of enterprise, and of the prospect of booty, the increasing influence and rich possessions of the Church, attracted the lower classes in almost incredible yet well-authenticated numbers to her service. The Venerable Bæda himself allows that by the immoderate squandering of State property the defence of the country was endangered, and the King rendered incapable of rewarding his brave warriors according to their merits. With regard to the position of the clergy (cf. below, Cap. VI.), the amount of the Weregelt was, according to the law of the northerners, fixed expressly at two thousand thrymsas, the same as that of the civil Thane (App. vii. 2, sec. 5), that of the Bishop and Archbishop at eight thousand and fifteen thousand thrymsas (App. vii. 2, secs. 2, 3). As regards the marriage of clergy, we find even that of Bishop Wilfrid (Kemble, ii. 383). As against the danger of the abuse and the alienation of the Church, the picture given by Kemble (ii. 325) will apply also to this period.

geniuses of the first order, such as can only arise from similar surroundings.

When, then, for two long epochs the kingdom was inundated by hordes of northern pirates, when the newly consolidated kingdom, labouring under unspeakable distress and disorder, seemed likely to succumb once more to the fate attending the migration of nations, then for a second time the Church accomplished a great work of conversion, which, effecting a marvellous change, brought the barbarian hordes of pirates into peaceable relations with the land and the people, and effected, with surprising rapidity, the blending of the two nations into one.

This position of the Church and her popular internal organization determined likewise the relation of the Anglo-Saxon Church to the papal chair. The national exclusiveness which is shown in the retention of the mother tongue in the Liturgy and the Prayers, prevented the Pope from obtaining any considerable influence. The zealous endeavours of Wilfrid brought about, indeed, a conformity in some important doctrines, but no enduring influence of the Curia upon the English Church government. It was only in the times of Archbishops Dunstan and Odo that a Romanizing tendency sprang up, in the face of the resistance of the majority of the clergy, a tendency that conceded to the head of the Roman Church a supreme authority, and in certain cases put it into actual practice. This tendency was, in the last century of this period, the prevailing one; but more in aims than in results. When the great number of Anglo-Saxon statutes is considered, the close of the period can point to only a very small influence exercised by the Papal Decretals. The Anglo-Saxon ecclesiastical law remained a national one in a fuller measure than in any other country of Europe.

NOTE TO CHAPTER V.—**The relation to the papal chair** had been for a long time but little more than one of piety, combined with a respectful remembrance of the missionary labours of Gregory the Great and St. Augustine. The British Church, on the other hand, which had been spread from the north by the Scotch missionaries, did not recognize the supremacy of the Bishop of Rome, and the binding power of councils, which he alone had convoked; and she had also other notions as to the time of the Easter Festival, the

priestly solemnization of matrimony, etc. The work and influence of this Church within the Heptarchy were quite as significant as those of the Roman Church. It was only at the end of the eighth century that Wilfrid, with all the spirit and energy of his character, first represented the Roman primate in the Anglo-Saxon Church, and in some matters, such as in the celebration of the Easter Festival, gained a notable victory. The Anglo-Saxon Church has to thank the restless struggles of this man, carried on often by objectionable means, for its adhesion to the religious system of Europe, with all its weighty consequences. As early as the ninth century a continental writer calls the English "*maxime familiares apostolicæ sedis*," and the Anglo-Saxons became the most active and successful of Roman missionaries. But this relation ever remained merely an authority at a considerable distance, and one which contented itself with the functions of arbiter on special occasions, when the opinion of the Apostolic chair was sought in consequence of internal dissensions. The best proofs of this are the laments which from time to time the clerical profession emits, that no Church was in a worse state of bondage than the English (*vide* Kemble, ii. 324).

A new epoch commences with the invasions of the Danes. Once again the irreconcilable hatred of the vagrant warriors directed itself against the peaceable settlements of the Anglo-Saxons, and with especial fury against the rich seats of the "lazy" monks, who were held in contempt by the warriors. But as the most evil days have produced the best Christians, the Church raised itself triumphant from unutterable ruin to the work of converting the Danes, who, after they had accepted Christianity, entered into relations of loyalty and fellowship with the Anglo-Saxon population. With their conversion not only did the selfish, faithless spirit of the old worshippers of Odin appear to be overcome, but from the midst of the Danes themselves went forth the most zealous priests and the highest prelates of the Anglo-Saxon Church. In this period it is Dunstan who, with his well-known strivings after the elevation of spiritual power, represents subjection to the papal see. With the Danish element a new spirit was also brought into ecclesiastical controversies, and with characteristic energy the descendants of the old Vikings threw themselves into the disputes concerning the new faith. The spirit of asceticism in the progressive portion of the Church is an expression of the deep dissension in the national spirit, which had its origin in the invasion of the Danes, and in the growing contrast between poverty and wealth. It is certainly by no mere chance that, two centuries after Wilfrid, not only a portion of the clergy, but the secular magnates also, strove eagerly for the unity and power of the Church under the papal primate, for the celibacy of the clergy, and for the deliverance of the ministers of the Church from the bonds of secularism, and that these aims for many years showed a party tendency. The wretched condition of things which showed itself shortly afterwards under Æthelred II. proves to the unbiassed judgment that in Church as well as in State, licentiousness, rudeness, and sensuality called aloud for energetic interference. The hierarchical tendency in this period advanced a step further. But the formal adherence to the Curial system was first brought about by the Norman conquest.

CHAPTER VI.

The Anglo-Saxon Class-relations, and the National Assemblies.

The mutual relationship between property and the performance of duties to the State, which has its origin in the duties we have described, forms the first basis of the English class-relations. The military, legal, and police systems, and even the Church, are so dependent upon the performance of duties attached to property, that, so far as regards the immediate claims of the community, the landless man is as good as non-existent; and the small one-hide property is only capable of satisfying those claims in an incomplete and scanty manner. With the development of private property, the number of subjects capable of performance of duty to the State decreases; the majority of the free-born subjects appear only capable of performing such duty in the service of the propertied classes, and in this sense lose their position of national independence. The whole nature of landed property contains a progressive tendency towards dependence, which continually strives after a legal recognition. I proceed to show how in the Anglo-Saxon period the power given by possession and the legal title, arising by the performance of State services, operate in the formation of classes.

1. The dependence of the landless classes upon property is recognized by King and National Assembly; the kind of family relations which have hitherto subsisted become State relations. Attachment and fealty to the lord is seen to be

a duty that can be enforced. To defend the lord becomes a recognized right and the duty of the vassal; treason on his part against his lord becomes, like treason against the King, an inexpiable offence. The oath of allegiance taken to the lord is worded like that taken to the King:—"*Sicut homo debet esse fidelis domino suo, sine omni controversia et seditione, in manifesto, in occulto, in amando quod amabit, nolendo quod nolet.*" Personal service is considered a lasting necessity. When a man has been slain, his lord receives the penalty as a legal compensation, as the King does where independent persons have been killed. The man stands under the special "peace" of his lord. And any person, too, who has a claim against the man, must appeal in the first place to the lord, and afterwards to the King's court. For this the lord must admonish his man to fulfil his legal obligations towards third parties as well as towards the State, though how far this responsibility for, and quasi-representation of, the man went, in respect of reparation for wrong committed, and of penalties, cannot be quite clearly ascertained from the passages in the statutes. These principles are primarily mentioned as applicable only to the personal followers, but it appears to be understood that they were equally applicable to settlers upon the soil, "*cosaeten*," "*geburen*," and tenants upon mesne-land (amongst whom there might be even slaves). The power of arrest residing with the lord, was certainly extended over all dwellers upon the soil of the landlord, whether they were personal servants, tenants, or their belongings.*

2. The higher duties in the military and legal systems led to the legal recognition of a higher class, to the notion of Thaneship, the Anglo-Saxon gentry, and to further gradations. Even before the time of Ælfred, the retinue which the King and the magnates employed in the service of war,

* As to the recognition of a legal condition of dependence of the serving classes, and those who were settled upon granted land, compare especially K. Maurer, "Krit. Zeitschrift," ii. pp. 331–365. The purely personal oaths of the Saxon period (for the Formula of which see Schmid, App. p. 405) have incorrectly been brought into connection with the later feudal system. Those relations of dependence are still regarded as personal, and may be compared with the modern regulations for menial servants.

and appointed to the royal military offices, are distinguished in the ranks of the Ceorls, as a more honoured class. Whether the Thane was a landed proprietor, or only a grantee of folk-land, or land held of a superior, or whether he obtained his subsistence only in the royal household, military honour and the expensive service of the heavy-armed soldier caused the whole class of Thanes to stand higher in the social scale than the possessors of one hide, and the landless man. The higher character of the services performed appears now as a sufficient reason for the higher legal status of the man in the scale of punishment, in giving credible evidence, and in participation in legal proceedings. The immediate standard for estimating a man's worth is the weregeld, which has been fixed in a proportion of two hundred shillings to twelve hundred; that is, it places the Thane six times as high as the ordinary free man. Among the North Angles the scale is as 266 thrymsas (= 200 shillings) to 2000 thrymsas. The last-named sum is doubled for the gerêfa, and doubled again for the Ealdorman or the Bishop.

But since under Ælfred and his successors every estate of five hides is reckoned in the militia system as one heavy-armed man, the rank of a Thane becomes the right (as such) of the possessor of five hides; and the dignity of Thane is an accumulation of rank and possession, service and office, like the later title of the *Barones*. Where two degrees of the higher rank occur, as a twelve hundred man (thane) and six hundred man (gesithcundman), the former may denote the man bound to military service with an estate of five hides, the latter the warrior without such free possessions. The fine or compensation which the King, or the lord of a murdered man receives, is graduated in a similar manner (thirty, eighty, or an hundred and twenty shillings). In the same manner was calculated the protection of the house-right where the peace of the township has been infringed (five, fifteen, or thirty shillings, and in the case of a bishop sixty, and archbishop ninety shillings). Analogous again are the fines for violating chastity and the *mundium* of widows.

As the whole legal system of this period primarily rests upon the legal protection which is afforded by fines, the higher rate of compensation being invariably a recognition of a higher class privilege. Where landed property has become a condition precedent to performance of service to the State, a larger property becomes a title to a higher position in the community. And where a higher standard for the normal performance has been fixed, the smaller freeborn man, on the other hand, no longer appears as a "full man." The majority of the freeborn sink down to incomplete subjects in respect of the community—to a lower class. The primitive origin of this maxim in the practice of the national courts proves that we are here concerned with legal conceptions.**

3. From the co-operation of both these conditions the notion of territorial lordships is developed. The master and landlord was in possession of the actual power to dismiss his gesith, and deprive his tenants of the land they held from him. From this position of authority follows *de facto* the right of the lord to decide disputes among his gesith and tenants. An appeal to the King's court against the will of the lord, would have immediately jeopardized the economic position of the "man." But the claims of third parties also were first to be brought before the lord; in fact, they were generally settled through his mediation. That portion of the fine (wite) which is paid by independent persons

** The gradations of classes according to the weregeld, the application of similar gradations to the whole system of penalties and to the value of the corroborating oath, is common to Anglo-Saxon law and to the national laws on the continent. But the wide and early inequality in property is seen among the Anglo-Saxons in the great distance between the classes (two hundred to twelve hundred shillings, for instance); whilst on the continent the contrasts are proportionately less. The normal standard of two hundred shillings for the ceorl (as equivalent to the twyhynde man) is found at first in Alfred, x. 18, secs. 1, 2, 29, 39, 40, and later as a tolerably uniform standard. There has been much dispute as to the position of the "syxhynde man," who in Wessex occupies a middle place between the "twelfhyndeman" and the "ceorl," and appears also later to be identical with the "gesitheundman." Apparently this intermediate grade did not maintain itself long. (See Schmid, Gloss. v. *Gesith* and *Thegn*: Maurer, Krit. Zeitschrift, ii. 60, 62, 396, 510; Lappenberg, i. 569–573.) In conclusion I may generally refer to the well-known maxims of the German popular laws, and to the digest of them in Lappenberg, i. p. 601 *et seq.*: Schmid, Glossarium; and K. Maurer, Ueber das Wesen des ältesten deutschen Adels, (Munich, 1846), pp. 123–198.

to the royal sheriff, falls in this case to the lord, as an analogous recognition of his rights as a mediator. When thereupon the extended responsibility of the lord for all the settlers on his soil became added, police duties brought with them corresponding police rights, and responsibility for his "man" (for which again the lord himself was allowed to demand security) led to a right of arrest and other preventive measures. Through the recognition of the State, there arose out of a domestic "*imperium*" a "*jurisdictio*," which was the real and effectual court of law for the dependants. As the power of these magnates increased, further royal privileges passed gradually to the territorial lordships; and from the time of Cnut even an inferior criminal jurisdiction. Where within such close lordships free allodial peasants were still found scattered as settlers, there was at last practically no other way of subjecting them also to the lord's court, than by royal grant. (Cod. Dipl. No. 902.) Now when we consider that the greatest landlords possessed, in the person of their armed followers, effectual means for the maintenance of the peace in their immediate neighbourhood, and that their powers as landlords and masters and their legal and police jurisdiction became more interwoven in each succeeding generation, there were present here the germs of a system of small states, analogous to those on the continent. The great lordships with their numerous magistrates now ranked alongside the Hundreds. Nominally, indeed, the county jurisdiction includes in itself all these lordships, but in the face of a compact "*saca et soca*" the interference of the Shir-gerêfa was now merely an exception, and a royal reservation.***

Through the effect of this legislation the classes which have

*** As to the importance of the Anglo-Saxon landlordism, see the essay of Zöpfl, "Alterthümer des deutschen Reiches und Rechts," vol. i. No. v. pp. 170–211, in which, however, the analogies drawn with the state of affairs on the continent are to be used with caution. (See further the well-grounded treatise of K. Maurer, ii. pp. 49–56; Lappenberg, i. 572; Schmid, Gloss. v. *socn*.) The blending of those economic and legal conditions was so unavoidable that even the powerful personal influence of Cnut could not change anything therein, and it is since Cnut's time that the royal rights of sovereignty appear mere reservations in reference to the lordships. (Cn. i. cap. 12.)

been formed by the varying scale of property appear now also in a legal gradation of ranks, which afford numerous parallels to the class-formations of the continent.****

In the first class are the great Thanes, *i.e.* the owners of great lordships, and with armed followers. We gather from the records, as also from the nature of the case, that their number was small, and may be compared with that of the later "*barones majores*." They are, as a rule, distinguishable by the exercise of a separate jurisdiction "*saca et soca*" to the extent of a Hundred Court. According to a passage in the *Chronicum Eliense*, an estate of about forty hides was in those days regarded as the minimum of landed property for such a great Thane. They fill the high offices of State, and the secular dignities of Ealdormen, and appear as the actual leaders of armed retinues. But the incompleteness of this class privilege is demonstrated by the fact that in regard to their Weregeld they are twelf-hyndemen, like the smaller Thanes, and only have a higher Were in their capacity as Ealdormen, or by virtue of some special official dignity. On a par with them stand in the ecclesiastical hierarchy the Bishops and certain great abbots, but the Bishops, raised both by dignity and property, stand on a higher grade of Were than the other Thanes. (1)

**** On the Anglo-Saxon class distinctions, which result from this combination, there is a comprehensive monograph by Saml. Heywood, "Dissertation upon the Distinction in Society and Ranks of the People under the Anglo-Saxon Government," (London, 1818, 8vo); *cf.* Hallam, "Middle Ages," app. iii.; K. Maurer, "Ueber das Wesen des ältesten deutschen Adels" (Munich, 1846), pp. 123–196; and "Krit. Zeitschr." ii. 415, 31; ii. 30–68, 388, *et seq.*; Kemble, "Anglo-Saxons," c. 7; Stubbs, "Const. History," i. c. 8.

(1) The position of the secular great Thanes in the civil gradation of the Weregeld and the legal compensation is not different from that of the class beneath them. In like manner their lordship (*saca et soca*) over a greater district, so far as the constitution of the tribunals is concerned, is (if certain grants be excepted) not different from the *saca et soca* of an ordinary Thane over a single estate. The inheritance of an Ealdorman's dignity is (with perhaps the exception of the county of Cheshire) only an actual and not a legally recognized institution. Even at the close of this Anglo-Saxon period, in the family of the Majordomus Godwine there is as yet no inheritable dignity to be discovered. The troublous times that followed, especially the Danish struggles, were in this particular also favourable to the aristocratic element. The reason why the Danish period leaves behind it in the constitution so few traces, is that it brought about only a partial alteration in the persons of the Thanes, and a local colonization.

A middle rank (to a certain extent the "middle class" of the period) is formed by the thousands of "county Thanes," possessors of more than five hides of land and of martial retinues (twelf-hyndemen and six-hyndemen). The first named, as Witan, constitute the regular County Assembly, and, where they are numerous enough, the Hundred Court also.

The appointment of Thanes to royal offices is, moreover, so much a matter of course, that the term Thane is used promiscuously to denote a royal officer, royal warrior, and a greater landowner. Outside the ecclesiastical hierarchy the ordained priests are included in this class as "Mass-thanes," whose Weregeld was, however, in later times, variously determined according to their birth-rank (Leges Hen. i. c. 68). (2)

The third class is formed by the smaller landowners, who still form an active element of the Hundred Court. Next

(2) As to the position of the county Thanes, see Schmid (Glossar., pp. 664–668). The apparently unsurmountable difficulties are solved by the later form of the militia, which after Ælfred's days includes (1) the possessors of five hides, as such, (2) the heavy-armed vassals in the service of the King or of a great landowner independently of their own freeholds; and again by the fact that the state and court offices in the household of the King, and of the magnates, are at the same time military offices. Thaneship is accordingly a mixture of the conditions of property, of a military profession, and of an office, for which the general appellation Thane is as suitable an expression as the later word "*Baro*." This denotation of the "Men" embraces to a certain extent the full active citizenship of the times. Hence, and from other sources, the express mention of "Thanes without land of their own" (Athelstan, vi. 11; *cf.* In. 45, 51) is readily accounted for, as well as the various mention of *Thaini* without possession or with very small possessions, in the Domesday Book.

The half-developed hereditary quality of Thanehood is further accounted for, which, so far as it was dependent upon property, was a matter of course, but so far as it was dependent upon military vassalage was as yet in the beginning of its development. The idea of a ruling class is shown in the fact that the ceorl no longer becomes at once a Thane from the mere acquisition of five hides, but only "when he has a church and a kitchen, a bellhouse and a seat in the castle gate and a special office (sunder-note) in the King's hall" (Schmid, app. v. Of secular rank, sec. 2). On the other hand, in the essay upon Weregeld (cap. ii.) possession alone seems to be indicated as a condition precedent: "And when a ceorl comes to have five hides of land for the King's array, and he be slain, let him be compensated for two thousand thrymsas" (sec. 9). "And if he even comes to have helmet and armour and a sword inlaid with gold, *if he has no land he is still a ceorl* (according to Lambard's text—"although he has not the land, he is still sithcund") (sec. 10). These stages of transition and mixed conditions occur also in the development of the lower nobility upon the Continent. An express mention of the fact that Thanes could have other Thanes as "vassals," is to be found in the treatise upon the secular ranks (Schmid, app. v. sec. 3; *cf.* Edg. ii. 3; Athlr. viii. 8; Cn. i. a. e. ii. 32, sec. 1).

to these come, *infra classem*, the landless people, who were in the service of the household, or settled upon a lord's lands and forced by law to put themselves under the "peace-security" of a Thane, or of a tithing-confederacy. They are all *liberi homines*, but only in a technical sense, in contrast to the serfs. They still perform military services, but mostly in the train of greater proprietors; whilst the common military duty of the small proprietors exists chiefly in name and in case of need. From these common characteristics the whole class in the later Anglo-Saxon period is comprehended under the term ceorls. On account of the normal Weregeld of two hundred shillings they are called "twyhyndemen." And here it is especially characteristic of England that the general dependence of the lower classes upon great landed proprietorships does not, as in France, rest upon the "seniorat" (*i.e.* the recognized representation of the small man in the matter of military burdens by the greater landed estates), but upon the police protection of the Hläford over all the settlers on his soil. The comparative neglect of the military system had already in those days caused the class distinctions to be determined more by the police than by the military constitution, and gave the aristocracy more the political position of police magistrates than of "seigneurs" in the continental sense of the term. (3)

These class-gradations are regulated by quasi-mutual engagements, partly by property and partly by profession.

(3) The position of the free ceorl is now only connected with political rights by the fact that the ceorl may perform the duties of a judge in the Hundred Court, where local circumstances permit. In other respects the mass of the ceorls have already sunk to the position of passive members of the State. So much the more are the landless men, Welshmen, the freedmen, and the villeins *infra classem*. (See Stubbs, Const. Hist., i. 80.) The whole of the third rank, as regards its political importance, at the close of the period is dying out. But the civil freedom of the ceorl at the close of the Saxon period has been frequently and wrongly denied; Kemble, for instance, falls into the fundamental error of regarding all civil dependence as "slavery." The ceorl has his weregeld in his own right, is capable of bearing arms, of possessing freehold property, and also of rising to a higher rank by the acquisition of a five-hide estate. The later law of settlement certainly binds the mass of the labouring classes *de facto* to the soil, without on that account creating slavery in a legal sense. But it is certainly true that the name of the ceorl had a somewhat contemptible secondary signification.

Like property, they too are inheritable by birth, and with each generation approach nearer to the character of birth-ranks. The great offices and prelates' places are not inheritable: but as a matter of fact they are, under ordinary circumstances, regranted to the heir of the great Thane. The lesser Thanes appear in still greater numbers as hereditary classes through property and the entrance of their sons into the same relation of service; the sons also have "Thane-right" even before they succeed to the paternal possessions. This hereditary division into grades affected most the ceorls in their low position, which was becoming by degrees almost despised. In contradistinction to the ceorls, the higher and politically influential classes are grouped together as "eorls." And already expressions appear signifying hereditability, as "ceorlisc man," "ceorlborn," "thegenborn," "ethelborn." In considering these class-distinctions two views are met with; the somewhat older of the two regards the ordinary freeman as the normal basis of the State, and the higher class as an increase of honour. After Cnut's day, on the other hand, the Thane is looked upon as the *liberalis homo* properly speaking, in contradistinction to whom the ceorl is described as *illiberalis* (Leges Cnuti, iii. 21, 25), without intending thereby to call in question the ceorl's character of freedom as regards civil rights. Compared to the *liberalis homo* the Thane thus again appears as *liberalior*. And beyond all dispute in this lies the bright side of the Anglo-Saxon foundations. It was the Church which left it open to all classes to mount up, as their right, to the highest dignities in the land. But in the secular state also the right to rise into the higher ranks was kept open to all. Firstly, in the case of the hereditary servant, by the laws relating to emancipation. In the case of Welshmen by a law enacting that a stranger also should rank as a Thane, if he possessed five hides of land. In the case of the ceorl, by a law that he also gained Thane-right on the acquisition of five hides of land, etc. A merchant was to rank as a Thane if he had thrice crossed the seas. By royal grant of a high office (and the consequent endowment with an

estate), the ordinary Thane might rise up to be a King's Thane and an Earl. As at the Carlovingian Court, here also court offices were the direct way of putting new families on an equality with older ones; with regard to this the laws say, "let it be an incitement to worthy deeds that through God's grace a slavish villein can become a Thane, and a ceorl an Eorl, in the same way that a singing man can become a Priest, and a clerk a Bishop."

The elements of property that have hitherto been described, and their gradations according to legally recognized classes, when taken together, show the possible participation of the people in the collective will, and the political constitution of the Anglo-Saxon state. But this national representation displays, in the following degrees, the same stages of development, by which on the continent the original popular assemblies of the Germani were transformed into the later assemblies of the *optimates.**

* According to the testimony of Tacitus there was among the Germani a time during which the service for the army and duties in the law court were, as an established principle, the same for every freeman, and consequently the deliberation on matters of common interest was participated in by all the freemen under equal conditions. Among the small tribes the great judicial assembly naturally became identical with this deliberation on common matters. But this condition of things must necessarily change, so soon as a number of small confederations united and formed a larger community, which soon began to occur in consequence of common warlike expeditions and common defence of territory. The great undertakings of the national migrations which were dependent upon joint operations of war on a very large scale, must have been preceded by numerous combinations forming greater confederacies. As a rule these greater unions were based only upon the recognition of a common leader in war and upon a council formed by the chieftains of the individual tribes for the time being. A blending together of the sub-tribes to form a common legislative assembly was for local reasons as yet impracticable, and presupposed a closer union than was aspired to anywhere. Hence, in the whole range of authentic history we find only a single mention of such a joint parliament among the Saxons on the continent, in which thirty-six deputies (twelve each from Eastphalia, from Engern, and from Westphalia) took part. (Ex Vita S. Lebuini auctore Hucbaldo Elnonensi. Pertz, ii. 361.) Among the Anglo-Saxons a republican assembly of delegates of such a description could not originate in the same manner. Their expeditions in search of conquest were from the first dependent upon a permanent position accorded to the minor chieftains. Hence the early origin of hereditary principalities, which, after endless struggles, submit themselves to greater kings and after Egberht (821) and Eadward the Elder to one king, under whom, however, the special National Assemblies of each of the former separate kingdoms live on for a long time. But it is only after the time of Eadward the Elder that the periodical

(1) The oldest form of the popular assembly is a consequence of the fundamental Germanic idea of law and law-courts, according to which the mere ordinances of the magistrate could not alter the customary law established by tradition (*i.e.* the traditional procedures in civil and criminal law), being as they were rights inherent in every free-born man. This conception and the constitution of the tribunals act and react upon each other; as justice is dealt by free fellow-men, no despotic command from without can compel the judges to swerve from the legal usage. To effect a change in the *lex terræ*, the higher authority of the whole people must be required to induce the judges to accept the new law. In this sphere the German regarded those in authority over him merely as the head of a decreeing assembly.

(2) This original basis of a legislative assembly becomes modified, shortly after the settlement of the tribes, by the influence of property. The regular military service, as well as the practice of judging in the courts, gradually becomes concentrated in the middle and upper classes of landowners. As the result of their usual independent activity in military and legal matters, participation is confined in a narrower circle to the Witan, the *boni, probi, legales homines* as they are termed in the Latin official language, before whom the smaller common freemen recede into the position of mere bystanders. It is the habit of activity in details, which nourishes the interest and establishes a higher right to participate in action for the common good. Shortly after the migration of nations popular assemblies even of smaller tribes appear everywhere to be essentially assemblies of the "*boni homines*," who, under various national appellations, form not the whole, but yet the leading element of the assembly.

(3) With the union of the smaller tribes (*civitates*) into greater confederacies and kingdoms (such as Franks, Goths, etc.), the general popular assemblies altogether cease. Assem-

existence of united parliaments of the *Optimates* is in any measure authenticated. The analogies applicable here are found rather in the monarchy of Charlemagne.

blies of such a description would for geographical and economical reasons, owing to the mode of communication and travelling in those days, have been utterly impracticable, and, as a fact, never did exist. The representation of the collective people by the "*boni homines*" was accordingly limited to a narrower circle of "*meliores seu optimates terræ*," who included the most eminent members of the army, the Law Courts and the Church.

(4) Hand in hand with the ever increasing power of property, the hereditary family kingship comes into being, as the head of the *concilicum optimatum* described above. But to the kingship falls not only the right of fixing the place and time of the Assembly, but also that of its inseparable incident, the personal summons of the *meliores terræ*. In this, due regard was paid both to ancestral dignity and also to the objects of deliberation on military, legal, and ecclesiastical affairs, for which their ready co-operation was essential. The popular Assembly has now become the "*Consilium Regis*," the King, the "*arbiter*" as to the persons to be summoned; in which functions the influence of those who were customarily summoned, and the effectual result of the deliberation, materially limited the exercise of choice. It certainly was understood that beyond the circle of those specially summoned, persons residing in the neighbourhood, and when the militia was called out, those summoned to compose it, and in coronation and court festivities a still larger circle, should participate, not as equally privileged members of the *consilium*, but merely as "bystanders." Only when the continuous line of the family kingship was broken, or when the kingship showed itself incapable, or fell into dissension owing to usurpation, a right of wider circles to join in deliberation revived as a reserved right of the collective people.

Such was also the course of the Anglo-Saxon folk-motes; after the union into larger kingdoms the National Assemblies (*concilia*) are gathered round the person of the King. In the smallest kingdoms, as in Kent, the ordinary Law Court Assemblies remained identical with the popular Assembly. In

the larger kingdoms, the National Assembly could only include a narrower circle of "*meliores terræ.*" In a still greater measure was this the case after the union of the so-called Heptarchy. It was then the King's right not merely to fix the place, but to personally summon the "*optimates terræ,*" according to the purpose of their deliberation, touching common war operations, common institutions or changes in the military and legal system, or in the Church. Common regulations as to the militia and operations of war were necessarily deliberated upon with the leaders. The leadership which was acquired by ownership of land is now lodged in the great Thanes, who with their numerous armed retinues form the active army. The legal leadership is based on the office of the Ealdorman appointed by the King from among the great Thanes. From this point of view the Ealdormen and the other great Thanes were to be summoned to attend the National Assembly, as well as those Thanes who had been appointed to command in consequence of their military experience.

Common alterations and changes in the *lex terræ* and the legal system were necessarily discussed with those who habitually presided in the tribunals. These are again, the Ealdormen appointed by the King, and with them the Shirgerêfas; the great Thanes also, apart from these offices, as having special courts of their own over their own people. Since the diminished influence of the military element the legal system mainly influenced the constitution, and the term "Witan" (*Juristor, Rechtskundige*) from this point of view is regularly used to denote the members of the National Assembly.

Upon ecclesiastical affairs those were necessarily consulted whose province is doctrine and the cure of souls. These were the Bishops appointed by the King, and when great monasteries sprang up, certain abbots with them. The great landed property of the Prelates put them upon an equality with the great Thanes, and, coupled with their ecclesiastical dignity, gave them the first place. From the nature of its organization the Church is less connected with the individual county

assemblies than with the central national assemblies, where the ecclesiastical influence becomes concentrated, and the spiritual and temporal estates are bound together. The hand of the clergy is distinctly visible in the numerous decrees for moderating class-privileges. Ecclesiastical matters are discussed in the first instance, and as a rule exclusively, by the prelates.**

These premises are corroborated by all the accounts touching Anglo-Saxon national assemblies, which after the time of Eadward the Elder appear in great numbers. The Witenagemôtes are formed out of the prominent elements in army, court, and Church. They meet from time to time, to settle the disputes between the various elements in the community, and to discuss and enact in common the most important measures for the present and the future. The summoning of the members takes place by royal writ. But as an acknowledged capital did not exist for the customary place of assembly, the King determines such place of meeting, varying his choice extensively, according to time and circumstances—which necessitate a call by express summons. As property is a condition of all the chief positions in the Commonwealth (with this difference, that in the secular con-

** Particulars as to 147 Witenagemôtes from the year 698 to 1066 are given by Kemble, vol. i. pp. 207–230. The name Witenagemôte is a conventional one. In the records they were styled, like all the Saxon Law Court Assemblies, gemôtes, "*Commune concilium, curia magna, assisa generalis, placitum universi populi, placitum omnium liberorum et hominum*," etc. The subjects for deliberation included, as we see from the extant Anglo-Saxon laws, decrees as to war and peace, and resolutions as to the legal system, but especially as to the maintenance of the peace, and police regulations. In addition to these, we have the separate group of ecclesiastical affairs. The recorded decrees of course form only the portion which appeared to be of permanent importance. The current business included settlement of disputes between powerful Thanes and prelates, and popular grievances of all sorts, especially complaints of the denial of justice. The Witenagemôte is not so much a Court of Appeal as a supplementary resource for those who were unable to obtain justice in the county. The enacting character of the Assembly is expressed in the style:—"(*Ina*) *per commune concilium et assensum omnium episcoporum et principum, comitum, et omnium sapientum et populorum totius regni;*" "*Edgardus rex consilio sapientum;*" "*sapientes consilio regis Athelstani instituerunt,*" "*Rex Edmundus et episcopi sui cum sapientibus constituerunt.*" Its consent is expressly mentioned in the conclusion of contracts, summoning the army, in ecclesiastical ordinances, but most frequently in the allodification of Folkland.

stitution property leads to office, and in the ecclesiastical constitution office to property), a representation of property is also inherent in the Assembly; but not of bare possession, but of property according to the duties it performed to the State; of property in proportion as it effectually fulfils civil functions. And therefore it is that we find no trace of elected members; for neither in the army, the tribunals, nor the Church is the principle of election, in the modern sense, applied. No trace occurs of a special representation of the cities, since they have no independent existence, either for the tribunals, the army, or the Church, but are absorbed in the county. No trace is visible of the representation of manors as such; for the great Thanes actually form for the purpose of the militia their own divisions, and in the legal system their own manorial courts; but military and legal duties are still legally incumbent upon the individual under Thanes. Hence we find also no trace of a recognized hereditary nobility, neither a higher one for the great Thanes, nor a lower one for the other Thanes; but an actual inheritance of property and influence, which both actually and in the common perception must begin to appear like a "birth rank." ***

*** As to the component parts of the Witenagemôte, the signatures of the decrees which have been preserved to us, give authentic information. They begin generally with the names of the royal family and the bishops; then follow those of some *principes*, *duces*, and court officials, *i.e.* Ealdormen, and other great Thanes. Then those of "*milites*," i.e. Thanes, thirty, forty, or more in number, who have received a writ of summons. The greatest number of signatures that has been hitherto discovered amounts to one hundred and six; frequently we meet with numbers between ninety and a hundred; and more frequently smaller numbers occur down to twenty and less; in connection with which we must particularly observe that very often special assemblies were holden for the ancient divisions of the kingdom. As in the case of the county assemblies there were also bystanders. The "men" of the county were nearly always present, and still more regularly the magnates brought with them a numerous train of Thanes, priests, and others. The ascendency of the Bishops and the great Thanes silenced the voice of the freemen and the retinue. Only where a new King was to be acknowledged, was the acclamation or dissatisfaction of the bystanders regarded as of any moment, and this was a reminiscence of old times. An elective principle exists only among the subordinate spheres. In all the important offices, on the one side the needs of army, law courts, and Church, for an extensive political system, have established the principle of royal appointments, and on the other side the social law prevails, which modifies the overweening power of property by royal appointment, without which the offices, as on the continent, would have been appropriated to themselves by the magnates on account of their property. The judgment of Palgrave (vol. i. 118) is historically correct.

The indefiniteness of these conditions and the intermingling of later institutions has attached various fictions to the Saxon Witenagemôte. Sometimes it is described as a House of Lords, sometimes as a House of Commons, and at any rate as a legislative and tax-granting assembly. As a matter of fact, it was neither of the first two, nor was it, again, in the later sense of the term, a tax-granting body; it was rather a *Consilium Regis*, formed out of the leading elements in the army, in the law court, and in the Church, a representation, so to speak, of the masses of property according as they actually fulfil their political functions. But the decided ascendency of the great Thanes in these assemblies is unmistakable, and this ascendency compels the weaker kings to fill the great offices according to their advice, and to enact the most important measures according to their counsel. This appears the more distinctly, as with the decay of the common military array, the armed force becomes concentrated in the great Thanes and their skilled soldiery. The counterpoise which the ecclesiastical constitution at first afforded, afterwards loses its power. Especially after the conversion of the Danes to Christianity, the prelates' sees pass even more completely to members of the same distinguished families, which on the secular side of the State dominate as great Thanes. Persons and tendencies became on both sides more homogeneous. In the aimless confusion of the political system under Æthelred, this aristocratic character of the constitution becomes established; under Cnut it is an accomplished fact; under Eadward the Confessor the highest dignity in the realm is but a shadow kingship.

CHAPTER VII.

The Decay and Fall of the Anglo-Saxon Kingdom.

State and Church should knit together what society separates. The vital strength of a political system is therefore to be measured according to the antipathies which it has been able to surmount. These were in England less antagonistic than those which the dangerous soil of the Roman provinces presented to the Germanic settlers: yet the Saxons, Angles, and Jutes, had also to struggle on the British Isle with considerable national, social, and ecclesiastical discordances, over which at last they were unable to gain the mastery.

I. As a **national antipathy** that of the Keltic-British element was first to be overcome. The barbarous warfare of the early centuries had partially annihilated the Romanized Britons, partially ousted and driven them back, but to some extent had also incorporated them. The haughty conquerors now called them "the strangers," "waelen." The formation of the English language, in which many words relating to domestic life and the occupations of women are of British origin, proves that the Saxon settlers also took to themselves native women for wives, without giving up their own stronger tribal peculiarities; a certain number of the Britons were also kept as servants. Where the Germanic settlements were only partially able to people the district, even British landowners remained in possession of their peasant farms, or at least retained a holding on granted land. The incorporation of British provinces in the Christian times was brought about

generally under better conditions. Later times recognized even a higher class-privilege in the case of "waelen" possessing five hides of land. Christianity, and a life led side by side for centuries, triumphed over national animosity. A consequence of this intermingling, however, was that in the great province of Mercia, the Germanic nationality could not form its political system with the same uniformity and durability as elsewhere.

A further antipathy arose from the tribal diversities existing among the Germanic settlers themselves. Angles, Saxons, and Jutes originally hardly differed in their language, their law, and their customs. But the contrasts became somewhat more sharply defined, after the individual chieftains with their followers and soldiery had formed small states upon their own possessions. For more than two centuries the so-called Heptarchy displays a picture of a struggle full of vicissitudes, in which the chronicles mention not less than a hundred battles and campaigns; in consequence of which the more peaceable small states became subject to the three larger and more warlike ones. It was highly important in this crisis that as early as the end of the seventh century, the larger portion of the Anglo-Saxon Church should have become united under Archbishop Theodore. After the ecclesiastical unity had worked powerfully for a century and a half, and prepared the way for political unity, the country, at all events as far as the Humber, is united under the supreme sovereignty of Ecgberht (827). The common calamity of the Danish wars, and the common deliverance by Ælfred, completed the internal blending of the peoples. The brilliant reign of Æthelstan shows us the old tribal diversities truly removed: the differences of the Heptarchy have ceased to exist. After Eadward the Elder, the union of the formerly separate National Assemblies has been successfully achieved.

But meanwhile a new antipathy had arisen through the invasions of the Danish and Norwegian pirates, who, with ever larger armies, succeeded, after endless ravagings, in becoming masters of the country about the year 878. The southern

portion of the kingdom, it is true, rouses itself under Ælfred to victorious struggles. But the hard-won peace between Ælfred and Guthrun leads only to a division of the kingdom, in which Norfolk, Suffolk, Cambridge, Ely, a part of Bedford, and great districts in Mercia subject to Wessex, were given over to the Danes. A relatively small number of the foreign warriors sought to establish themselves here in the military settlement of the "five Danish burgs," Lincoln, Nottingham, Derby, Leicester, and Stamford, with which were at times reckoned York and Chester. In other districts the more scattered invaders took possession wherever possible of the greater estates. As usual, the proprietary class was especially affected by the conquest. Still on the whole this first stratum of Danish settlement showed itself so unstable, that before the death of Eadgar the dynasty of the Cerdics had again become lords of the Danish provinces. The influence of peaceful settlement, marriage, and above all, the unceasing labours of the Church in this the prime of the Anglo-Saxon kingdom, effected, except in a few places, an assimilation of the Danish element. The independent confederation of the Danish cities was again dissolved after the subjection of Leicester and York (918). But under Æthelred the Unready there was a second period of invasion by Danes, who were superior both in importance and civilization to the rude hordes of the earlier epoch. The result of varying engagements leads (1016) to a division of the kingdom between Eadmund Ironside and Cnut, in which the northern portion of the country is abandoned to the Danes. After the murder of Eadmund the southern portion also submits to the powerful Danish king, not indeed as to a conqueror, but as to "one chosen" by the Witan to be head of the whole kingdom. The quarter of a century of this Danish dynasty certainly left behind it weighty consequences. Though the total number of the northern invaders did not perhaps amount to one-tenth of the whole population of the country, yet a deeply rooted dis-union had arisen in the leading class, a dis-union which was all the more fatal in its consequences, as Cnut

knew no other means of consolidating his rule, than by murdering, banishing, and supplanting the popular old families. The great assembly of the Witan of the kingdom exhibits from that time forward a curious mixture of Danish great Thanes with Saxon Lords and Prelates, whose respective ideas and interests, although not described by the laconic historians of the times, can be gathered from the events of the period. This internal disunion divided the old mother country of the dynasty of Wessex less than the rest; but the great territory of Mercia, owing to its always mixed population, and to the Anglo-Danish Thaneship, became a region upon which no reliance was to be placed in times of serious danger. Things were worst in the northern districts, in which there was an almost undistinguishable blending of tribes which might easily lead ambitious governors to declare themselves independent. Under Eadward the Confessor the prominent Danish element, coupled with the opposition against the hierarchical tendency of the Church, appears in the family of Earl Godwine, which, being in possession of the great governorships, had now reduced the kingship to a mere shadow of sovereignty.(1) The antipathy of the nationalities,

(1) The antipathy of the nationalities is primarily dependent upon the continuance of the British-Keltic national element (Lappenberg, i. 122, *et seq.*, 104 *seq.*). A statistical proof of the strength of the Keltic element is nowhere to be found. In the language, in which Whitaker considers that there are still three thousand words of British origin, it is evident that the numerous Gaelic words relating to domestic life and small domestic occupations, point to marriage with British women, or to British domestic servants. In general it was the western counties, towards the borders of Wales, which showed an intermixture with the Keltic element. It is especially prominent in the counties of Dorset, Somerset, Wilts, and Devon, which Ælfred the Great was the first to incorporate, and also in Cumberland. The tribal diversities of the Angles, Saxons, and Jutes, are exhaustively treated by Lappenberg, i. 85–103. In the Anglo-Saxon statutes, the traces of it are hardly discernible. The tribal contrast in the kingdom of the Anglo-Saxons and Danes appears of no great importance in the treaty between Eadward and Guthrun (Edw. et G. 3, 6–9). In Cnut's day a different fine is mentioned for the "*trinoda necessitas*," Cn. ii. 65; for denial of justice, Cn. ii. 15, sec. i.; for *Hámsócn*, Cn. ii. 62; differences existed in the royal privileges, Cn. ii. 15; and in the purgation from accusation of treason against the king, Æthlr. xi. 37; for security in the case of thefts, Wilh. i. 3. sec. 3; i. 21, sec. 2. Already in the earlier Danish period Eadgar had secured to the Danes the preservation of their law (Edg. iv. 12, 13). In still greater measure was this the case in the second period; notably in Cnut's reign, in which a Dane law "Danelage," as a collective expression for certain special legal maxims (Pro-

however, became alike injurious to both dynasty and kingdom, when it coincided with another disintegrating force.

II. This was the **social contrast** of the propertied classes, which for centuries had been undermining the Anglo-Saxon commonwealth in its very foundations. In many districts the first settlement had laid the foundation of a free peasantry in a comparatively weak manner. The customary forms of the military and judicial system, under the feuds of the Heptarchy had, in almost equal degrees, contributed to the degradation of the smaller landowners. Ecgberht's kingdom was already in great districts entirely portioned out into estates and manorial possessions. The great misery which both epochs of the Danish invasion spread over the country brought about the almost universal ruin of the small freeholds which then existed, the result of which was seen in Cnut's laws and manorial grants. The strength of the freedom of the common people, the self-respect and the martial excellence of the Anglo-Saxon Ceorl, diminished from century to century, in spite of the guardian power which the King wielded. Even the prosperous times of the monarchy only delayed but did

vincial law) is distinguished from the "West Saxenalage," and from the "Merchenalage." That these were not thoroughly different systems of the whole Civil Law is proved by statements as to the real meaning of these differences. A further tribal affinity between the invaders from the Scandinavian lands and the Angles and Jutes of the first settlement, existed from the very first. In later times this question has become the subject of a party controversy, in which an attempt was made to prove that the Germanic foundation of England was not attributable to the Angles and Saxons (*i.e.* the former inhabitants of Schleswig-Holstein), but to the Danes and Denmark (E. I. H. Worsaae "An account of the Danes and Norwegians in England," 1852). The Norsemen who from the eighth to the eleventh century disquieted Europe are hordes of the great Teutonic family, who, coming from Norway, Denmark, and Sweden, infested the continent. The Anglo-Saxon population called them "Danes," from the nearest coast from which they sailed, without inquiring concerning the more distant lands from which they started. Were all the formations of words and syllables, which in proper names and names of places are quite as much "Anglish" as "Danish," to be taken as evidence of Danish origin, quite half of England could be described as Danish, and the Anglo-Saxon element represented as the declining and subordinate one. (*Cf. contra:* Donaldson, "English Ethnography," Cambridge Essays, 1856.) The Danish element certainly preponderated in Norfolk and Suffolk, and along the coast line between the Humber and the Forth; it may divide the north and north-west fairly equally with the Anglo-Saxon. The computation which gives the number of the Norsemen who stayed in the country at two hundred thousand, is probably rather too high than too low.

not prevent this process of dissolution. As yet no civic and industrial life was able to develop itself, to raise the ancient freedom to new strength and new honour upon the foundation of new modes of property. No new principle of military service had been discovered, which should prevent it from exercising a destructive influence upon the smaller landowners.

Thorough reforms, such as the Carlovingian laws attempted, appeared in England less urgent, because its insular position continually induced carelessness. The mild sway of the royal race of Cerdic, under the advice of their spiritual and secular Thanes, was ever averse to violent aggression, and only cared for a well ordered administration, without touching the legal basis of the military system, viz. vassalage and a popular army. Cnut's energetic nature preferred, when in peril, to rely for the support of the royal throne upon a mercenary guild of three thousand Huscarls, which could find no permanence among the popular customs, the conditions of property, and the finances of the time. The militia, however, continued in its wonted groove. Cnut had also found it advisable to conclude a peace with the Church. In like manner he allowed the accumulation of landed property to go on without interruption. Like a meteor, therefore, the phenomenon of the powerful Norse king passed by, without solving any one of the problems of this political government. Still less capable of such a task was the weak rule of the last heir of the old royal house of Wessex. (2) Under the feeble rule of Eadward a third antipathetic force comes into great pro-

(2) For the social forces opposed to the constitution I must refer my readers to the picture given in cap. iii. of the local land distribution. This was the primary evil which the Anglo-Saxon State, in spite of its numerous excellent supports, could not hope to eradicate (*vide* Kemble, i. 252). William of Malmesbury says of the national assemblies of this time, that as often as the Eorls assembled in council, the one chose this and the other that topic; they were seldom agreed in any good opinion; they deliberated more concerning domestic treason than concerning public needs. The same picture is drawn by Lappenberg, i. 460; *cf.* also Stubbs, Const. Hist., i. 211. "The cohesion of the nation was greatest in the lowest ranges. Family, township, hundred, county held together when Ealdorman was struggling with Ealdorman, and the King was left in isolated dignity. Kent, Devonshire, Northumbria had a corporate life which England had not, or which she could not bring to action in the greatest emergencies. The Witenagemôte represented the wisdom, but concentrated neither the power nor the will, of the nation."

minence, the way for which was prepared in the course of the preceding generations.

III. This was the **opposition** of the **ecclesiastical to the royal** power. From the earliest times the Church had been the reconciling element among national antipathies; she had helped the triumph over the smaller dynastic states; she had shown herself in the early Danish times once more as the reconciling polity-creating power. But the Church could never have attained to this powerful position, except upon the broad basis of landed property; this property to the extent of about one-third in the kingdom was, in the later Anglo-Saxon times, in her hands. Her higher tasks were thenceforth entangled with interests of property, which in two directions opposed the demands of the State. First of all, the Church was the chief impediment in the way of changes in the military system, which were every day more urgently needed, for she absorbed through her expansion the possessions of the State in the Folkland, and so deprived the sovereign of the means of keeping on foot the requisite number of skilled warriors; this was admitted by Bæda even in his time. The modest share borne by the Church in the decayed militia was not sufficient; there was needed besides for the military requirements of the day a very great increase in the numbers of the Thanes. But the powerful interest of the Church was antagonistic to any fresh distribution of the military burdens; for every firm and more just distribution on the landed property affected first of all the possessions of the clergy, who were little inclined to make sacrifices for such ends, and still less to allow a secularization of Church lands. And yet no permanent military constitution was possible without serious demands upon Church property. It would have required a violent reformer to beat down the opposition the spiritual Witan would make to such changes; in short, the monarchy in this critical century lacked its Pepin or Charles Martel.—In another direction, the Church assisted still further the expansion of "landlordism" in the legal system. Being herself in possession of privileged lordships and estates, she

contrived to gain before all else an extension of the power of private jurisdiction; and in conjunction with the secular magnates she thrust down the free people deeper and deeper into the condition of a dependent tenantry. The entry of the most noble classes into the Church had been a blessing in those times, during which she had to accomplish, in the face of violent selfishness, the great task of educating the people. But after she had herself become the greatest propertied power, and especially after Danish times, she appears ever more deeply bound up with the interests and the dissensions of the order of Thanes, in whose factions she took part in a very worldly manner. This worldly mindedness is indeed opposed in the Church by a strong ascetic tendency. But this new tendency is a Romanizing one, which finds its ideal head in Rome, and in the struggle between Dunstan and Eadwig does not shrink from humbling the power of the King. The Church, in the reigns of Eadgar and Cnut, had become already a buttress of the temporal power. Romish views and Romish proclivities, the traditions of the Roman empire and a capital of the world, the legislation of the emperors and the popes, have all become part and parcel of the aims of the Anglo-Saxon clergy—aims which, from personal inclinations, Eadward the Confessor was only too ready to further. About the middle of the eleventh century all these hostile elements in the State presented themselves in such a combination that a strong will alone would have been able to cope with them. The reign of Ælfred the Great and his immediate successors had pointed out in all departments the direction reforms must take in order to restore to the State its waning power. But the dynasty of Cerdic was not destined to remain the creative power in England beyond the single century of its glory. Whilst want of public spirit, disputes, and open violence were conspicuous at all points, the Anglo-Saxons in this critical period experienced the misfortune of having a personally incapable royal family. The settlement of the warlike Danish Thanes had severed the ties which once bound the Anglo-Saxon magnates to the royal house. Beside them stands a

powerful and intriguing band of Prelates, who, associated with the families and proprietary interests of the nobles, are bent on the consolidation of their own power internally, and the insuring of their own privileges, whilst externally they aim at extending the sphere of their power, partly by a closer union with Rome, and partly by an alliance with the Norman duke. With the decay of the old county constitution, with the ever stronger oppression and deeper humiliation of the freemen, national feeling and national strength sink down, and the country is prepared for becoming the prey of the foreign conqueror. It is always the military constitution which is the weakest point in this organization of the Anglo-Saxon State, a weakness which shows itself in the fact that the united kingdom could never entirely obtain the mastery over its British and Scotch neighbours on the borders. All the good institutions fall into decay, the burghs and strongholds are neglected, and the soldiers' guild of Cnut is soon dissolved. A few decades of peace, and the non-appearance of any foreign foe, appear sufficient to cause a relapse into the old state of carelessness in which men's minds are only occupied with the struggles of the nobles, and with the Church. From Church and State harmony and self-dependence have disappeared. (3)

(3) As to the ecclesiastical antipathies of later times, *cf.* Chapter V., Note **. Under King Eadgar internal peace and order are certainly restored, but this is apparently due to the fact that Archbishop Dunstan rules in the King's name. During the long miserable period of Æthelred II. the prelates in general appear devoid of character and untrustworthy. In the statutes of these times the moral condition is visible in the serious warnings which are especially addressed to the clergy (Æthlr. v. 4. *seq.*; iv. 2; Cn. i. 6, 26). In Eadward the Confessor, as well as in Godwine and his military dependents, are embodied two great contrasts in the life of the later Anglo-Saxon period. The King, educated in exile upon the soil of France, is disgusted with the drinking bouts and manners of the Anglo-Danish magnates; and the clerical chroniclers with their Norman leanings love to describe the rough national manners, the drunkenness and coarse debauchery of the nation. Eadward tries to escape from the secular high life of his times into quiet monastic rest; but there again the national Anglo-Saxon feeling of the clergy in their deviation from the Roman Church annoys him. He is a foreigner in his manner of life, and he surrounds himself with the friends of his youth, and with French chaplains, whom he makes Bishops. The court-language is already Frankish. Frankish body guards and Frankish gerêfas of the burghs at last drive the Danish Thanes into open opposition, which ends with the victory of Godwine; and the King is henceforth placed under the guardianship of the secular magnates. According to a credible record, in his last hour the childless Eadward appointed his brother-in-law Harold to be his suc-

Dismal indeed as the picture of the last generation appears to an historian, yet out of the confusion of this epoch two bright features gleam forth, features which the changes wrought by time have not been able to efface. The first is the preservation of the Germanic judicial system which still surrounded personal freedom with protecting barriers. Judgment delivered by peers (*pares*) and the forms of compurgation might fail the weak man as against the powerful man; but they remained a strong bulwark against the arbitrary action of royal and manorial magistrates. Even in the beginning of its decay the Anglo-Saxon judicial procedure still gave the impression of a fair trial; accordingly it was for this reason that the fundamental principle of "trial by peers" was ever jealously clung to by the heavily burthened ceorl, as the point which alone lends value to the legal conception of freedom. Even in the greater lords' courts the old *ordo judiciorum* appears to have kept its place. A formal court assembly of the soccagers (theningmanna gemôt) is indeed mentioned in the case of royal soccagers (Cod. Dipl. 1258). The feelings of the Anglo-Saxon Thanes did not incline towards arbitrariness and severity, and the later accounts show us at least that in the private courts a regular practice had become formed, as

cessor. But Norman writers suppress or deny this decisive fact. On the other side a former verbal promise is quoted, which Eadward is supposed to have given in favour of the Norman Duke William, and which Harold is said to have acknowleged with weighty oaths, when he found himself by chance in the power of the Norman duke. The latter part of Eadward's reign is a network of intrigues within the oligarchy, among which a portion of the high born clergy already regarded with hope the Norman duke and the new Frankish culture. A number of the spiritual lords had long since turned to the rising sun, and prepared for the open espousal of the Conqueror's cause. In the decisive struggle for the national existence of the realm, Harold found himself almost entirely dependent upon the strength of the old kingdom of Wessex, in which State and Church, Thanes and people, still held together more than elsewhere. When the great army of the Norman duke had already set foot upon English soil, the military array of Mercia, and the greater number of the secular magnates still held aloof from the conflict in faithless neutrality. The decisive battle of Hastings (Senlac) was only a struggle made by the peasant army of Wessex, with numerous followers and mercenaries. The men of Kent, the national army, in the consciousness of fighting for the national existence, struggled with a persistence and bravery which seem to show that with all the dissensions and degeneracy of the ruling classes, the heart of the Saxon people generally was healthy. A striking picture of this decisive struggle is given by Freeman ("Norman Conquest," iii. 450–507).

well as a manorial system, which differed according to the locality. The confederate element in the tithings, and in the various voluntary unions or guilds into which the inhabitants round the burghs entered, preserved some vigour to the institution for maintaining the public peace. The second permanent legacy was the development of family life and of the character of the people by the national Church. It is true, that in no other European country had the conversion to Christianity left behind it such deeply rooted and enduring effects as here. This fact is only apparently concealed by the later attitude of the superior clergy, and by the faithlessness of Danish Thanes, in whom the new Christian dogmas had not yet overcome the old spirit of Odin-worship. But so far as the Christian element was permanently blended with the national Anglo-Saxon, there was manifest in high and low a moral core of benevolence, truth, and faith, which found expression in the mild sway of the Anglo-Saxon lords as contrasted with the rule of their greedy successors. On these foundations it was possible to build up afresh a vigorous monarchical system. But what the weak and expiring dynasty of the Cerdics was unable to compass was, through the dispensation of Providence, to be vouchsafed to this country by the hand of a foreign conqueror.

SECOND PERIOD.

THE ANGLO-NORMAN FEUDAL STATE.

CHAPTER VIII.

The Property Bases of the Norman Feudal State.*

William I., 1066–1087	Henry II., 1154–1189
William II., 1087–1100	Richard I., 1189–1199
Henry I., 1100–1135	John, 1199–1216
Stephen, 1135–1154	Henry III., 1216–1272

With this period State and society enter into new relations. The Anglo-Saxon Commonwealth appears suddenly invaded by a conquest, by the thrusting in of a tribe originally

* From the sources and literature I may specially mention—(1) (*a*) The so-called "*Leges et consuetudines quas Wilhelmus rex post adquisitionem Angliæ omni populo Anglorum concessit tenendas*," for the most part not new decrees, but Anglo-Saxon law, in so far as it was recognized by the Conqueror (with certain additions, for example, c. 22, 31) in a Latin and French text. To these is added (*b*) a short statute having reference to the criminal procedure between English and Franks in an Anglo-Saxon and Latin text; (*c*) "*Carta Wilhelmi Conquistoris de quibusdam statutis*," etc., in Latin text, with distinct traces of interpolation; (*d*) *Carta Wilhelmi* concerning the separation of the spiritual jurisdiction from the temporal, which, according to Spelman, must be placed about the year 1085 (*cf.* Schmid, "Gesetze der Angelsachsen," lvi. to lxi. and the copy pp. 322–357). Without doubt the first-named, "*Leges Wilhelmi*" contain real ordinances, which have only in later times been brought into the form of a continuous statute. The genuine originals are to be found reprinted in Stubbs' "Select Charters," pp. 83–85. The so-called "*Leges Henrici I. et Eduardi Confessoris*" are private works dating from the twelfth century, containing Anglo-Saxon law as applied under Norman rule, and hence given under the Anglo-Saxon records of law.

(2) The legal works of Norman jurisprudence are, Glanvill, "*Tractatus de Legibus et consuetudinibus Angliæ tempore Henrici II. compositus*" upon the procedure in the *Curia Regis*, printed among others in Phillips' "History of English Law," vol. ii.; Bracton, "*De Legibus et consuetudinibus Angliæ*" (London, 1640), an exhaustive exposition of the private law and procedure of the period from 1240–1255 (a new edition by Travers

northern, which, on the soil of Normandy, had adopted French language and customs, and brought over with it a peculiar military and legal system. The Duke of Normandy is recognized as King of England by a formally summoned National Assembly. The old controversy, whether William the Bastard conquered England, or under what other title he acquired possession of the country, may be considered as decided by the Conqueror himself, who declared that he had entered upon the possession of the country as the designated testamentary heir and legitimate successor of King Eadward.

Twiss); Britton (Ed. by Nicholls, 1865) and Fleta, two abridged law-books dating from the time of Edward I. A general survey of the legal sources of this period occurs in Biener, "Engl. Geschwornen-Ger.," vol. ii. App. vi., pp. 83–99. A copious survey of the history of the French, Norman, and English sources of law is given by Brunner in Von Holtzendorff's "Encyklopœdie," ii. 4. A new contribution to the collection of the sources is M. M. Bigelow's "*Placita Anglonormannica* from Will. I. to Rich. I." (London, 1879).

(3) State Treaties and Administrative Records of the Norman times in Rymer's "*Fœdera, conventiones, litteræ* etc." (new ed. 1816 to 1830; 3 vols. in 6 parts, A.D. 1066–1391). The administrative records, which from King John downwards were chronologically enrolled, and lately in part described, and in part published by the Record Commission, fall into the following principal groups: (1) Patent-rolls from 1200–1483, formerly preserved in the Tower, containing the regular acts of Government inclusive of foreign treaties, grants of offices, privileges, etc. Cf. "A description of the Patent-rolls in the Tower of London," by Duffus Hardy, (1835). "*Rotuli litterarum clausarum in turri Londinensi asservati*," 2 vols. (2) Law Court records and pleas since Hen. II., printed in part, "*Placitorum abbreviatio*" (London, 1811); "*Rotuli curiæ regis*," ed. Palgrave. (3) Calculations and Transactions of the Exchequer, partly in print (*Rotuli oblationum et finium*, *Magnus Rotulus Pipæ*, etc.). In addition the "*Dialogus de Scaccario*" in Madox; "The History and Antiquities of the Exchequer of the Kings of England," 2 vols. (London, 1769) is, through the reliable reprint of the Records, a book of great general value. As to the State Land Register, Domesday Book, see note ***.

(4) Treatises on the History of English Law: Sir M. Hale's "History of the Common Law," 2 vols. ed. Rimmington (1794); Reeve's "History of the English Law" (3rd ed., 1814). A curious, but much used and useful collection is to be found in "*Henrici Spelmanni Codex legum veterum statutorum regni Angliæ ab ingressu Guilelmi I. usque ad annum 9 Henr. III.*" Printed from Spelman's papers by Wilkins, p. 284 *et seq.*, and in Howard, "Anciennes loix des François," Rouen, 1766, vol. ii. pp. 120–428. An excellent exposition of the sources with introductions is that by Bishop Stubbs, "Select Charters" (1874), pp. 79–425. For the legal procedure, *cf.* M. M. Bigelow, "History of the Procedure in England from the Conquest" (London, 1880); Forsyth, "History of the Trial by Jury" (new ed., 1857); Brunner, "Entstehung der Schwurgerichte" (1872).

(5) General History of England: Lyttleton, "History of Henry II." (London, 1767), 3 vols.; Hallam, "Middle Ages," cap. viii.; Lappenberg-Pauli, "Geschichte von England," vols. ii. and iii. The principal work on this period is Freeman's "History of the Norman Conquest of England," vols. i.–vi. (the first two volumes in the 3rd edition). Important additions for the Norman period are also given by Stubbs, "Constitutional History," vols. i., ii. (1874).

This was the only manner in which the new monarch could gain the permanent obedience of his new subjects and make a stand against immoderate pretensions on the part of his followers. It was not, therefore, the tribe of the Normans, but Duke William who had got possession of the country, with a title from the pretended will of Eadward, with the consent of the highest authority in the Church, and with the consent of the National Assembly, by means of numerous allies and paid soldiers. As a matter of fact, as well as of right, it was possible to treat the country in this way as a personal acquisition, as the "Seigneury," "Dominion," "*terra regis Anglica*," "*terra mea*"—a designation frequently found in the records: "*Gulielmus I. conquestor dicitur, qui Angliam conquisivit*, i.e. *acquisivit* (purchased), *non quod subegit*" (Spelman, Glossary). The mutual relations of the Saxons and *Francigenæ*, however, remained for many generations hostile. The conquered people repaid the haughtiness of the victors by attempts at rebellion; and when these failed, by silent animosity towards the new lords and their French customs. The best way of considering the period is therefore that of a permanent military occupation which (with its numerous fortifications and the maintenance of paid soldiery) led to a thoroughly new military organization. But the same change was also founded on the needs of the country. The Anglo-Saxon Commonwealth had fallen through internal dissension, a defective organization of its military array, and the faulty distribution of the military burthens. To regain the unity and power that was lost, in the place of a discordant system of national militia and personal vassalage, the whole of the landed property in the country, so far as it was able to bear the necessary burden of heavy armed troops, had to adopt the principle of a standing army based upon the revenue derived from the land. This was almost a common need with all the Germanic states that had risen on the ruins of the old world; and in the centuries of striving after it, isolated elements of the feudal system appear already in the Anglo-Saxon period. But there was still wanting such a permanent and uniform

bond of service as was compatible with the personal freedom of the obeying party and the honour of a freeholder; hence the manifold preliminary arrangements, attempts, and relapses. The period of the feudal system dates from the time when the feature of military burthens becomes predominant in landed property, and the grants, to which the character of military pay is attached, give the warrior a permanently dependent position. England is the only state in which, through special circumstances, a systematic application of this system was possible, which made the State in some measure the sole proprietor, thence proceeding to a fresh distribution. It was the position taken up by William as the legitimate successor to King Eadward which settled this question also. In treating as rebels King Harold and those who fought on his side, and the Saxons who afterwards opposed William, a legal justification was found for a general confiscation of landed estates. The inheritance of Eadward, the possessions of the family of Harold, and the remainder of the old Folkland were immediately seized as royal demesnes. By virtue of grants, the leaders of the conquering host entered into the possessions of the rebel great Thanes, and in like manner the warriors serving immediately under the Duke were endowed with estates that had become vacant in the different parts of the country. The great feodaries could either immediately furnish their contingents or do so by sub-infeudation, by which means a portion of the Saxon Thanes, who had not been compromised in the war, could remain as under-vassals upon their old estates. In like manner the possessions of the churches and the monasteries were retained to them, and in some instances even increased. The object that the royal administration now pursued for a century was to impose, upon the whole mass of old and new possessors, an equal obligation to do service for reward. The standard adopted in carrying out this system was approximately that of the five hides possession of the Anglo-Saxon period; yet with a stricter rating according to the value of the produce. At that period an estate of such a productive value would be

bound, at the royal command, to furnish one heavy-armed horseman for a forty days' service in the year (*servitium unius militis*).

The legal incidents of these newly-organized modes of property** were only definitely established in the reign of Henry II.; but conclusions and interpolations show us that the royal administration adapted the feudal customs that had been formed in Normandy to the territorial conditions which existed among the Saxons: "*illis* (that is to the Anglo-Saxon laws) *transmarinas leges Neustriæ quæ ad regni pacem tuendam efficacissimæ videbantur adjecit*" ("Dialogus de Scaccario"). The English feudal system is made up of these two elements. Five legal incidents stand out here sharply defined, which in some measure differ from the continental feudal system.

1. **The Conditional Hereditability of the Grant.** According to Norman-French custom, such hereditability has been considered the rule in Anglo-Norman fiefs. (1) Yet the form of grant "*dedi et concessi tibi et heredibus tuis*," only means a concession amounting to a continuous military pay. The

** As to the law incidents proper to the feudal system, the views of Littleton, Selden, Coke, and Blackstone are clearly condensed in the comprehensive note of Hargrave to Coke on Littleton, 191. The proceedings at the great act of homage in the court held at Salisbury are recorded in the Anglo-Saxon chronicle in the same terms as they are narrated in the "Annales Waverlienses," A.D. 1086; "*ibique venerunt coram eo barones sui, et omnes terrarii hujus regni, qui alicujus pretii erant, cujuscunque feodi fuissent, et omnes homines sui effecti sunt, et juraverunt illi fidelitatem contra omnes homines*" (I. Report on Peer's Dignity, 34). The technical terms of feudal-law, "feod, feudum, barones, vavassores, felony relief," etc., appear in the Domesday Book here and there mingled with the older expressions. The word "*feudum*" had hitherto occurred in no contemporary source of the Anglo-Saxon law. The term "baron" is said to occur for the first time in a letter from Pope Nicholas II. to Eadward the Confessor (Heywood on Ranks, 210).

(1) The hereditability of the English fiefs down to King John is doubted by Palgrave (i. 385). He says it was at that time that the writ *de terris liberandis* first was framed, that until that day the investiture of the new feoffee was regarded as the subject of a fresh compact. It is true that the so-called Carta Wilhelmi (iii. 5) contains the express assurance: "*Prout statutum est eis, et illis a nobis statutum et concessum jure hereditario in perpetuum, per commune consilium totius regni nostri.*" But this passage belongs to the spurious additions, which in Stubbs' "Charters" have been rightly repudiated. Nevertheless, in the Norman-Frankish feudal law the hereditability of the fief had become so far established that the King could not deny it without driving the whole of the vassals to resistance, besides the great vassals who were at all times ready for revolt. The hereditability has never from the first been seriously disputed. The weak point lay only in the defects of the administration of justice, especially in the want of a right of action to compel the King to renew the fief.

enfeoffment of the heir only took place conditionally upon his being a man capable of fighting; and that of the heiress only where there was a failure of males, and in order that she might marry a warrior and one acceptable to the military chief. Accordingly it was natural that the feoffee could neither sell nor mortgage the estate, nor make it a security for his debts, nor dispose of it by will; and hence follow these further legal incidents:

2. **The Relebium, Relief.** As an acknowledgment that the feudatory only possessed the estate on condition of doing military service, a certain quantity of weapons and accoutrements or a sum of money were rendered by Norman custom, when a change of the person bound to service took place; out of which proceeded at last a fixed recognition-money of one hundred shillings for each knight's fee. In a certain sense the *Prima Seisina*, Primer Seisin, is an addition to this. For greater security the King, as lord of the fee, could take possession of the estate after the death of the vassal until the successor proved his title, or, where necessary, pleaded and obtained his right, and bound himself to pay the *relevium*. According to old feudal custom the lord could in this way claim a whole year's income. (2)

3. **Feudal Wardship and Marriage.** As it is an act of favour on the part of the feudal lord, to give the fee to one personally incapable of military service, so he can take back the estate, when the heir is a minor, and can exercise in

(2) The reliefs are based upon Norman-French customary law. With regard to the Saxon Thanes the King could also refer to the laws, of Cnut ii. 70, 71; and probably this is the meaning of the Leges Wilhelmi I. 20, in which with unimportant deviations from the original, the law of Cnut is translated; similarly in Hen. I. c. 14. The question has been materially elucidated by Freeman and Stubbs. The "heriot" in the Anglo-Saxon sense continued as an obligatory duty of the heir to "make payment," but yet therein was recognized an hereditary right of possession residing in the vassal. Now the Exchequer substituted for this position the Franco-Norman feudal idea, according to which the lord is from the first the actual owner, and grants by investiture to the new feoffee a "*dominium de novo*" (Stubbs, i. 261). The payment of the heriot in horses and weapons ceased with the Assize of Arms (27 Henry II.), according to which the weapons of the deceased should always be preserved to the heir. Since then a sum of money, amounting to 100 sh., was fixed for each knight's fee.

person or through a *custos* the rights belonging to it, and continue this wardship, enjoying the profits, until the completion of the heir's twenty-first year, without rendering any account (Glanvill, vii. 9, sec. 6). As *tutor legitimus* of the ward's person he might also give the heir in marriage when the latter has arrived at a proper age, and on such an occasion can exact money payments; a custom which arose under circumstances when the nearest agnate was wont to drive a bargain concerning the marriage of the ward. In failure of sons, the heiress remained under this profitable wardship until her majority, and when she had come of age, was married by the feudal lord to a husband, who now became the real feodary. In the spirit of the old wardship the marriage of the female ward was also regarded as a money business. The revenue rolls show us how, in Normandy also, female wards were given away for 100, 600, and 700 livres of Anjou (Madox, i. 520; Glanvill, vii. 12, sec. 1). (3)

4. Aids, auxília. The original destination of the fief as a means of obtaining service for the lord binds the vassal to an extraordinary contribution in extraordinary cases of honour and necessity, notably to ransom the lord who has been taken prisoner, to endow the lord's eldest daughter, and when his eldest son is made a knight (*pur faire Fitz-Chevaler*). These three cases are mentioned in the Grand Coutumier and amongst the Normans in Naples and Sicily as the customary ones, but do not absolutely exclude other urgent cases, especially contributions made by the under-vassals towards the reliefs and aids which their lord pays to his feudal overlord, and for the payment of his debts. (4)

(3) Feudal wardship and marriage are certainly derived from Norman-French feudal customs, for to have founded them upon Cnut's Thane-law (Cn., ii. 72–75) would have been less advantageous for the Exchequer. More exact information is given by Glanvill, vii. 12, according to which the marriage of the daughters of the crown vassal is derived from the *tutela legitima* of the feudal lord; but the right of consenting to the marriage of every heiress, from the circumstance that otherwise the feudal lord could have a vassal forced upon him. The assent was not to be refused without "*justa causa*," but neglect in obtaining it is punished with the loss of the fief.

(4) The Auxilia will be treated of more fully under the head of Financial Administration.

5. **The Escheat, Forfeiture of the Fief,** is the last decisive point in which the conditional value of the grant appears. The former takes place when the feudatory dies without heirs capable of succeeding to the fief; a case that must frequently have occurred, inasmuch as, until the time of Henry VIII., there was no right of disposing of lands by will. Still more frequent was forfeiture on account of "felony," which includes almost all important crimes, regarding them from the point of view of disobedience towards the feudal lord. The especial harshness of the English feudal law adds to the formal attainder on account of "treason and felony," a corruption of the blood or disability of the descendants to succeed to the inheritance. (5)

These are the five points of the feudal system, round which for centuries the most important dealings with the vassals revolve. As to their origin the oldest authorities are remarkably silent; no statute introduced the feudal system into England, or in any way regulated its details. The charters of William contain merely a general recognition of the conditions of property. Nor is there any trace of bestowals of fiefs through which the Saxon Thanes either sought after or received a re-grant of lands to be held "according to feudal law;" and it cannot have originated in the framing of the deeds of feoffment, for these were only expressly formulated in much later times. It was rather the practice of the finance control and of the courts which in course of time developed its details from the following combination of circumstances.

When the Conqueror conferred investiture upon one of his faithful followers, there lay in the use of the customary words a reference to customary legal relations on the side of the grantee, and of the thing granted.

1. The grantee subjects himself through the words "*devenio*

(5) The right to property for which no heirs can be found was already found in the Anglo-Saxon law (Cod. Dipl., No. 1035), but, in consequence of the want of a right of disposing by will in the case of the feudatory, attained new and unheard-of dimensions. Forfeiture on account of crimes is even in the Anglo-Saxon period not confined merely to treason, as is generally supposed, but also took place in the case of other serious crimes. But in the feudal law still stricter principles of felony were also applied.

homo vester" to the law, as established in Normandy, and as it is administered according to the custom there; and the Anglo-Saxon cannot in this matter claim a right different from that of the Norman.

2. The thing granted is, as a matter of course, granted according to the rights which the preceding possessor had; that is, with all the burthens and duties which originated in the conditions of the Anglo-Saxon Folkland and land granted to tenants, and in the conditions attached to the alienation of Bocland: the Norman also was in these matters to have no greater right than the Saxon. Where these two relations were not in congruity, the Crown was naturally inclined to put in force whichever right was more favourable to itself. But in other respects it was necessary that the feoffees should be treated as nearly as possible alike. Hence in the Exchequer and the Curia Regis (that is, from a financial as well as a legal point of view) new principles were formed which kept the middle path between Norman and Saxon customs, and blending both together produced after some fluctuation a uniform law. And from these points of view all the details of the feudal law can be explained.

The most important deviation from the continental system lies in the institution of arrière-vassals. The Conquest itself and the mixture of nationalities had rent asunder the natural bond subsisting between the great vassals and their followers, so that the Conqueror could successfully put in practice the maxim that every under-vassal and greater freeholder must take the oath of allegiance to the King *immediately*, by which means, as regards military service, all subjects of the realm should be immediately under the King. Consequently every oath of fealty, which is sworn to the private feudal lord, excepts allegiance to the King, "*salva fide debita domino et heredibus ejus*" (Bracton, ii. 35, sec. 8). By this maxim which came into complete operation in England, the key-stone was inserted in the edifice of the feudal state; and a final sanction was added towards the end of the Conqueror's reign, at a great extraordinary court and muster of the feudal militia,

held at Salisbury; with regard to which the Saxon Chronicle uses the words: "*Omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere ejusque facti sunt vasalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fides futuros*" (Chron. Sax., A.D. 1086). By a great act of homage the infeudation of the whole of the landed property in the country was here proclaimed as a law of the kingdom. It was, indeed, an important event in English history, when William made his faithful followers, from the greatest magnates down to the squireless knights and the freeholders, kneel down before him, and placing their folded hands in the hands of their royal master, swear to him the oath of fealty on account of their possessions. This act alone necessarily gave the English political life a different direction from that of the continental states.

Connected with this systematic introduction of the feudal system, in the years 1083–1086 a comprehensive property-register of the kingdom, the "*Domesday Book*," *** was drawn up with unexampled completeness and accuracy; a register invaluable to the Norman political administration, and equally so, as a trustworthy groundwork, to the historian. A division of the land into knights' fees does not appear in this land register; but a perfect foundation for a future list of fiefs was laid in it by the registration of townships and hides, embracing not only agricultural soil, but landed property, with all its appurtenances in the shape of customary services, dues, and safe-conduct money. The existing conditions of the land and soil remain in the lower stratum unchanged, but

*** The origin of the Domesday Book is described in Lappenberg, ii. 143–154. It was officially printed in the year 1783, in two folio vols.: to which were added four supplementary registers and indices, in two additional volumes of the Record Commission, 1816 (Explanatory treatises by Kelham, 1788; Sir H. Ellis, "Introduction to the Domesday Book," 1833). Lately, the Latin text has also been printed for certain counties *in extenso*, without the abbreviations (London, 1862, etc.). Thirty-four counties appear, but not the counties of Northumberland, Cumberland, Westmoreland, and Durham, which were as yet not in the secure possession of the Normans; Lancaster does not appear to have been organized as a county until Henry III.; London, Winchester, and certain other cities are also wanting. The attested sum total of the men was 283,242; that of the registered "hides" about 225,000.

henceforth they form material for new tenures in accordance with feudal law.

At the head of these masses of property stands the King with a reservation of more than one thousand manors, together with numerous chases, parks and forests, formed out of possessions, for the reservation of which the old relations between the Saxon royal house and the Folkland gave a good title. The former possessions of the great Anglo-Saxon Thanes, and county Thanes, which had become vacant by death, flight, and outlawry, form the principal material for providing for the vassals of the King; the Saxon Thanes who still remained in possession are to be found principally among the *subtenentes* of the Norman magnates. The possessions of the Bishops and the monasteries are incorporated into the new system of property, with the proviso of a duty to furnish their contingent to the feudal militia. The freeholders who still existed, the landowners bound to magisterial duties (*sochemanni*), and the *burgenses* kept their places almost unchanged. In like manner the Anglo-Saxon peasants, ceorls, *villani*, remain as they were; also the farm labourers (*bordarii*), although these also were partially supplanted by servants whom the Norman lords had brought with them. In the still remaining serfs (*servi*), who were few in number, no change can be seen. As Domesday Book states the several modes of property existing at the close of the Anglo-Saxon period (*tempore Regis Eduardi*), as well as those at the accession of William, and when this land-register was framed, the changes which had taken place in these descriptions of property may be surveyed from the following table:—

Tempore Eduardi.		*Tempore Wilhelmi.*	
Chief proprietors and others	1,599	Vassals of the Crown	600
King's Thanes	326	Subtenentes	7,871
Milites	213		
Tenentes et subtenentes	2,899	Liberi homines	10,097
Ecclesiastici	1,564	Ecclesiastici	994
Sochemanni	23,404	Sochemanni	23,072
Burgenses	17,105	Burgenses	7,968
Villani	102,704	Villani	108,407
Bordarii	74,823	Bordarii	82,119
Cottarii	5,497	Cottarii	5,054
Servi	26,552	Servi	25,156

Hence we perceive that extensive changes have only taken place in the great landed estates, and that in the course of the Conqueror's reign the last Saxons have been ousted from the lands and from the position of great Thanes and Bishops. The grades of landed proprietors at this time are therefore as follows:—

1. About six hundred persons and corporations appear as secular and ecclesiastical Crown vassals (*tenentes in capite*), but in very different degrees. About forty lords (the later *Barones majores*) are enfeoffed of an aggregate of estates, which may be compared with the lordships of the Saxon great Thanes, but they are scattered about in different counties. About four hundred warriors (the later *Barones minores*) who served immediately under the Duke, were enfeoffed of single knights' fees or manors. The line of demarcation between the two is in this period merely one founded on fact, and a changing one. Among the spiritual lords the landed possessions of the majority of the Bishops and certain great abbots may be compared with those of the great secular feudatories; the great majority of fees are also, from this point of view, small. It is only when many small and doubtful forms of possession are added to these that the number of 1400 *tenentes in capite* appears, as given by Ellis. (1)

2. The second rank is formed by 7871 *subtenentes*. As the greatest feoffees had to furnish a whole company of heavy armed soldiers, subinfeudation was a suitable, if not a necessary, method of furnishing the contingent due. For the

(1) The number of the *tenentes in capite* is given by Ellis at 1400, but many very obscure elements are reckoned among this number. The extracts referred to in Kelham, give as follows:—

(*a*) Ecclesiastical entries; 19 Archbishops and Bishops (among them a few Normans); 20 *Canonici;* 56 Abbots, Abbesses and Abbeys; 38 *Ecclesiæ;* 11 *Presbyteri;* 2 *Diaconi:* 3 *Capellani;* altogether 153 single entries.

(*b*) Secular lords; 10 *Comites;* 394 other lords (among whom 214 are registered in one county, 180 in two or more places); 10 *Comitissæ;* 20 other women and daughters, and a few collective appellations, *Homines Liberi Regis*, etc.

I accordingly assume the existence of at least 600 Crown vassals in round numbers. The Anglo-Saxons had already been ousted from the greater possessions; Waltheof is mentioned as being the last Ealdorman, and Wulfstan as the last Bishop. Among the small Crown vassals, however, we find many with Saxon names.

Norman soldier this signified a fresh grant on the part of his chieftain; for the Saxon Thane, who was left in possession, it meant a limited recognition of his possession with fresh burthens. At the time of Domesday Book the partition of great estates into subfees had only been begun in a limited degree. But Crown vassals and corporations are even then both met with as under-vassals. (2)

3. The rest of the population, who were not subject to military service, were mostly, though not entirely, incorporated with the great estates in which they had for the most part a precarious or heavily burdened possession, to which were added also certain other burdens by reason of the feudal duties of the lord of the soil. As a constant companion of the feudal system is now added a tax duty (*tallagium*), to which all inhabitants of town and country were subject, who were not bound to the feudal military service. The chief groups are:—

10,097 *liberi homines*, among whom, however, the names did not yet imply possession of freehold estates. (3)

(2) Among the 7871 *subtenentes*, about one-half of the names are still Saxon; the Domesday Book makes mention of "taini" in nearly all counties (*cf.* Heywood, pp. 85, 120, 135, 200, 208; see also Ellis, i. 143). Division of large estates by subinfeudation permanently deprived the great vassal of the enjoyment of proprietorship, and was therefore avoided as much as possible. Only for the spiritual corporations there existed from the first a certain necessity for this course. It is expressly declared of Archbishop Lanfranc that by order of the King he enfeoffed the farmers on his lordships (the "threnges") as under-vassals: *præcepit rex, ut de eis milites fierent ad terram defendendam.* Especially for the landed estates of the cathedral chapters ten knights were enfeoffed, and for this purpose lands of the value of £200 were assigned. On the other hand, under William Rufus, the Abbot of Romsey was still allowed to furnish three knights to the feudal militia, without a formal subinfeudation (Stubbs, i. 262, 263). It is apparent from many instances that ecclesiastics and great vassals, with the royal licence, freed their whole estates from furnishing feudal troops, by creating by subinfeudation a certain number of sub-vassals once and for all. Landed estates belonging to abbeys are frequently mentioned, which, once granted to English Thanes, became under William subinfeudated in accordance with Norman feudal law (Freeman, iv. 479).

(3) Of the 10,097 *liberi homines* and 2041 *liberi homines commendati*, 4487 are met with in Norfolk, and 7470 in Suffolk, that is in Danish counties. According to the Dane law the compensation for the *liber homo* was three marks, that of the *socmannus* only twelve oras. Hence the appellation would seem to express a somewhat higher grade than that of the *socmannus*, although other passages seem to make this doubtful. The old *commendatio* was also interpreted by the Normans as a subinfeudation, though it merely signified the finding of a landlord as an act of agreement be-

23,072 *sochemanni*, hereditary possessors, who are only subject to the magisterial jurisdiction (*soca*) of a landed proprietor without being incorporated with an estate as tenants. (4)

7968 *Burgenses*, the great decrease in whose numbers is explainable from the desolation caused by the war. (5)

108,407 *villani*, the new term for settled ceorls or the proper villeins. (6)

82,119 *Bordarii*, that is, agricultural servants, workmen, and labourers, but who were often in possession of houses and small plots of land. (7)

tween the lord and the "commended." In the land register this relation is treated of as an *oblatio feudi*, and consequently as a transferable "real right," residing in the feudal lord (Freeman, v. 463, and Index, *s.v.*, "Commendatio").

(4) The 23,072 *soemanni* are recorded in almost exactly the same number as existing at the time of Edward. The institution must accordingly be based on a fixed legal conception, and this can only be the Saxon legal jurisdiction. In the treatise of Spelman, "*De Natura Brevium*," they are mentioned as having a title with specified services, as suitors exempt from the common popular courts, and only really bound in their own court, and capable of having others *in villenagio* under them. Certain soemen are met with again as under-vassals, and in possession of a whole manor (Ellis, ii. 389).

(5) The *Burgenses* had been reduced by war from their original numbers (17,105); Domesday Book describes the condition of decay and the number of forsaken houses in many individual towns.

(6) The *villani* (108,407) embrace the mass of the Anglo-Saxon ceorls in the position of peasants on the lord's estates, as well as a number of the old peasant proprietors and hereditary possessors, at the time of Domesday Book. It is difficult to believe that among the still doughty array of the peasants of Wessex and the "men of Kent," an hereditary proprietorship should have wholly vanished. As to the degradation of the *villani* in this period, see below in cap. xx., paragraph iii. For the rank of the "*liber homo*," the possession of a peasant farm was without any decisive influence: "*Item tenementum non mutat statum liberi non magis quam servi. Poterit enim liber homo tenere purum villenagium, faciendo quicquid ad villenagium pertinebit, et nihilominus liber erit, cum hoc faciat ratione villenagii, et non ratione personæ suæ*" (Bract., ii. c. 8).

(7) The 82,119 *Bordarii* are regularly mentioned in the Domesday Book after the *villani*, as being still inferior to these. According to Du Cange, the term answers to our "cottager," that is, denotes the labouring classes, to whom, in addition to their dwelling, a garden and a few acres of land had frequently been given.

A survey of these conditions is rendered more difficult by the fact that the Latin text of Domesday Book very frequently translated the Anglo-Saxon terms in an arbitrary manner; that the commissioners in the different counties did not make use of a uniform rule of expression, that one and the same term might embrace locally different legal relations; that on the other hand similar conditions were denoted in different places by different legal terms; and, finally, that our knowledge of the smaller kinds of property is exceedingly defective. As to the state of things at the close of this period, *vide* below, cap. xx.

The rule which determined the further development of these conditions was manifest: namely, that the Saxon could not claim more than the Norman, and that the lower classes (apart from the obligation to feudal military service) must subject themselves to the limitations and burdens laid upon them by the upper classes.

By the extension to these classes of the oath of fealty, the reliefs, escheats, and forfeitures, it came to pass that after many generations the maxim of jurisprudence was formulated "that the King is the universal lord and original proprietor of all the lands in his realm, and that no one possesses or can possess any portion of them, which is not derived mediately or immediately from a grant by him." The new order is a thorough arrangement of society into ranks according to military service, an immediate and effectual subordination of the upper classes in military obedience to the King, and consequently a still stricter subordination of the lower classes. The whole landed property became thus uniformly subservient to the State, and has remained so to this day.

The legal construction of the English Feudal System was deduced by the author of this work in the second edition of his "Englische Communal-Verfassung," and his "Englisches Verwaltungs-recht" (1863–1867), from the legal sources and printed records then available, but has been since that time completed and rectified by the copious investigations of Freeman, "Norman Conquest," vols. iv., v., and vi. (1871–1879), and Stubbs, "Constitutional History," vols. i. and ii. The material result of these valuable investigations (with a few supplementary additions on my part) are as follows:—

The belief which has come down to us from Selden and the antiquarian school, a belief which was hitherto universally received, that William I. divided the English landed property into military fees, is erroneous, and results from the dating back of an earlier condition of things. Equally erroneous is the statement which has been repeated for centuries, that the English real property was at a certain period distributed into 60,215 knights' fees, of which 28,015 were in the possession

of the Church, and the rest in the hands of secular vassals. These computations were arbitrarily set up by later antiquarians, by reference to the number of the hides, and are at least twice as high as they should be. The figures in this case are among the many numerical exaggerations of the older historians.*

Domesday Book does not contain a "fee-roll," but a "property-roll," upon which in later times the fee-rolls were framed. Palgrave rightly maintained that in that great register there is nothing to be found about "knights'-fees" as a special kind of tenure of landed property. The term *feudum* is, in the language of the land-register, a general expression for landed property under the new ruler. The term *miles* appears, as a rule, to be merely a translation of the Anglo-Saxon "thegn." Domesday Book simply describes the real property with its customary burdens and services, without making any mention at all of new burdens and services resulting from the new feudal bond, and even without any intimation that the new military service is different from the old. The land is not divided into knights' fees, but into *hidæ;* where the "men" of one or other great landlord are spoken of, the expression evidently refers, as a rule, only to the old Anglo-Saxon vassalage, or to the *commendatio* to a Hlâford as an institution of the Anglo-Saxon police control. It was only in the succeeding generations that the feudal military service was definitely apportioned on the basis of this register, and that the claims of the royal feudal lord in the exchequer were consistently enforced.

The occupation of the country after the battle of Hastings began with those counties from whose levies Harold's army

* The estimate of Higden in the "Polychronicon" (i. c. 49) of 60,015 knights' fees is contradictory of the fact that the Treasury itself could at no time give a correct estimate of the number of knights' fees. From Higden that number passed into the so-called "Eulogium," out of which again Selden, in his notes to Fortescue, has accepted the quotation, and has made of it a *tralatitium*. *Cf.* Stubbs, i. 424. At the close of the period, Stephen Segrave, a minister of Henry III., computes the number of knights' fees at 32,000, and even from such a number the knights' scutage could never be raised.

had been formed. In these a general confiscation of the landed property of the "rebels" took place, so that among the *tenentes in capite* scarcely a single Saxon name can be found. From thence the Conquest spread further towards the West and the North, until in 1070 the occupation was mainly completed. In this further occupation the principle is still adhered to, that participation in the struggle against William, as the legal heir to the crown, entailed as a legal consequence, not indeed, outlawry, but forfeiture of landed property; as the result of which re-grants were at once made to Normans and to certain favoured Angli. Those Angli, on the other hand, who had not taken part against him, or who had compromised themselves less, were allowed, by "redemption," to receive back their possessions from the King, as an act of his favour; accordingly, those who participated in his grace, received a royal writ (*breve*), which appears from that time necessary and sufficient for all purposes as a title of possession. The technical term for this is "*inbreviare*." According to the diversity of various cases, the *inbreviatio* is bestowed in consideration of small, greater, and often very large dues, and the "redemption" is granted either for the whole or only for a part; widows and poorer members of a family are sometimes allowed a small portion as a charitable provision. The theory and manner of expression of this "redemption," which are consistently maintained throughout Domesday Book, make it appear as a royal gift, by which the new lord of the whole country allows the former possessor a certain share in the soil. Later jurisprudence was able, accordingly, to deduce, with plausible reasons, from these "redemptions" the character of a conditional grant (tenure). The ecclesiastical estates alone were conceded to the corporations who were in possession of them, without the humiliating form of *inbreviatio*, because the theory of personal forfeiture appeared not to be applicable to them. Yet in the next reign, the system of tenures in all its bearings was extended even to these.

The landed property thus granted or redeemed was, accord-

ing to the Conqueror's plan, to be uniformly employed in forming the heavy-armed feudal militia. To the newly enfeoffed Norman lords this was the natural feudal custom of their country. To the newly enfeoffed Angli and to those who had redeemed their possessions, it appeared in the light of a just equalization. Yet the accomplishment of this scheme was not effected under William I. In the carrying out of it the difficulty with which the Anglo-Saxon administration had struggled for centuries immediately returned: a fixed standard for the apportionment of the soldiery was wanting. Since Ælfred's time, indeed, the general rule had been observed that a fully equipped man should be furnished for every five hidæ; but it had never been established as a rule of law as in the Carlovingian legislation; the apportionment had remained a matter of administration, regard being had to the state of the income at the time and to other conditions, and hence it was for the sheriff and the county administration an object of continual claims. Only in a few places a local legal custom had become established, which accordingly was carefully noted in Domesday Book.**

** In my "Geschichte der Communal-Verfassung," p. 17, I have pointed out that the fixing of military service according to the standard of the hide had not in the Anglo-Saxon period become a rule of law. It occurs accordingly only incidentally in Domesday Book. In a few cases in the royal grants the number of the warriors to be furnished was determined by privilege, which number was therefore not to be exceeded. Thus in the case of an important grant about the year 800: "*Verum etiam in expeditionis necessitatem viri quinque tantum mittantur.*" (Coenuulf, 799–802, in Kemble, "Codex" Introd. p. li.) And again shortly after this "*expeditionem cum duodecim vasallis et cum tantis scutis exerceant*" (idem, 821). In the latter case it was a matter of a grant of some twenty townships to a monastery (Cod. Dipl., i. 272). That where great grants were made to churches and monasteries a definite number of warriors should be expressly reserved was natural, seeing that the contingent furnished by the hundreds remained the same, so that the deficit would have fallen upon their neighbours. In like manner the privileges of the towns in the later Anglo-Saxon times must be regarded: the military service of which is fixed at five, ten, fifteen, and twenty hides, and in which we also meet with a money discharge, Chester paying a sum equal to 50, and Shrewsbury 100 hides (Lappenberg, i. 613). After the Conquest this institution appears as a local custom, as in Berkshire (i. 56. 6): "si rex mittebat alicubi exercitum de 5 hidis tantum unus miles ibat, et ad ejus victum vel stipendium de unaquaque hida dabantur ei iv. solidi ad ii. menses." Because the rate of the five hides was only a principle of administration, it was in practice much modified, and maintained itself as an established custom only in certain counties.

Apart from this, the apportionment of the cavalry service (which had now become more expensive) under the new schemes of property, and the valuation of the real estates according to their productive worth, was certain, after so many changes and desolating struggles, to lead to more violent disputes than ever. On the earnest endeavour made to carry out the plan at the time of threatened invasion in the year 1085, the King abandoned the scheme, in consequence of the probability of endless disputes; but he imposed a high tax (*hydagium*) upon the hides, and hurriedly collected a paid army with the other means at the disposal of his exchequer. Connected with this event was the well-considered plan to determine for the future, by means of a land-register of the realm, all the factors according to which, in case of future levies, the number of "shields" to be furnished should be fixed, and the other feudal dues exacted. Upon this basis, after the year 1086, the shares of the great landed proprietors were settled, according to which a heavy-armed man (*servitium unius militis*) should be furnished for each share. The *feuda militum* thus computed are no knights' fees of a limited area, but real portions of the profitable free estate. "The knight's fee is no manor, and no hide of a fixed uniform extent, but a unit of possession which imposes upon the owner the obligation of furnishing a fully equipped man for the usual period of a campaign. These 'units of property' comprise not only agricultural land but buildings, rights of cutting timber, mills, fisheries, salt and other mines, tolls, market dues, tithes, etc.; and also, as the furniture as it were of the soil, the mass of tenants, the greatest cities as well as the smallest villages, and single farms, the formerly allodially free peasant, as well as the serf who had settled on the land, with all customary services, dues, and protection moneys. Throughout the whole of the Middle Ages the normal standard of a knight's fee is not the acre-measure but a ground-rent of 15, and in later times generally of 20 lbs. of silver." *** The

*** I may repeat these words from the second edition of my "Englisches Verwaltungsrecht," as they appear to have accurately hit the material

judicial and police system appertaining to a manor are independent of this; a manor may be estimated at either more or less than a knight's fee, and as such has no connection with knights' service. It was only after a lapse of time, and in a limited degree, that knights' fees began to be settled on certain and determinate estates.

Accordingly, after the land register of the realm had settled the factors for the distribution of war burdens for the later generations, William found himself enabled to fix the keystone of his system, by the universal, fundamental and immediate obligation to allegiance, in which he included not merely his own immediate crown-vassals but their under-vassals also, as well as all the greater freeholders in the country, "*omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam;*" and his contemporaries have understood his act in its fullest extent, "*milites eorum sibi fidelitatem contra omnes homines jurare coegit*" (Florence). During the Norman reigns which follow consequences in all directions proceed from this basis.

The Norman Crown, as the heir of the Anglo-Saxon, retained all the powers and revenues of its predecessors, and as supreme feudal lord over all the land added to these the newly acquired feudal rights. The King claims obedience, military service, and tribute, in both characters; all *homines* are his men; he can summon them to his army, cite them to appear in his tribunals, can rate them in respect of his revenue, without the intervention of an intermediate lord. It is difficult to say what immense consequences might not have proceeded from this twofold position, if, after the fashion of all human affairs, a limitation of them had not

point. Under Henry II., after the knights' fees had attained their fullest development, there are to be found in the *liber niger, feuda militum* of 2, 2½, 4, 5, and 6 hides. For example Geoffrey Ridel tells us that his father possessed 184 *carucatæ* (=100 acres), for which the service of fifteen knights was due, but that no special knight's fees were formed out of them, but the obligation lay jointly and separately upon each *carucata*. Hence even in those times, a valuation according to the productive results was in existence, without dividing up the estates into separate knight's fees (Stubbs, i. 264). A copious use of extracts from the Domesday Book has been made by Freeman (Vol. v. Append. A, B, C, D).

arisen in another direction through the circumstance that all royal governments of this period began with a dubious or disputable title, and had to struggle with dangerous risings on the part of the great vassals, which took place either alternately or simultaneously in England and on the Continent. Immediately after the occupation of England begins the dangerous insurrection of Ralph Guader and Roger, the son of Fitz-Osborne. For a whole century, until the death of Henry II., these revolts continued on the part of the great vassals against the English feudal lordship, which they considered insupportable; they end with the removal or degradation of all the great families which at the time of the Conquest stood at the head of the martial nobility. In all these struggles the national Anglo-Saxon element cleaves with unshaken loyalty to the Royal house, and gains accordingly the most material concessions from moral, as well as from political considerations. The vouchsafing to all a like legal protection, the established system of the central administration, the consolidation of the constitution of the counties, cities, guilds, and all the elements which afford a counterpoise to the "great vassalage," spontaneously urge themselves upon the Anglo-Norman King as the policy which this state of affairs requires, without partiality either for the one or for the other nationality.†

William Rufus already makes his "Angli" significant promises, in order with the help of their faithful soldiery to humble the insurgent magnates, though he certainly does not keep his word. Indeed, the Royal feudal suzerainty was turned to account in this reign rather with a display of savage brute force and of greed for money. A quick-witted cleric, Ranulph Flambard, as Great Justiciary, unscrupulously utilized the fiscal part of the royal suzerainty against ecclesiastical and secular estates, and was the first to bring into operation the grasping fiscal principles of the English Exchequer.

† I may for the following survey refer my readers to the excellent sketch of the reigns in Stubbs' "Select Charters."

Henry I. begins his reign with a fair-promising Charter, by which he gains the sympathies of the nation for his defective title to the crown. Every sentence of this charter throws an unmistakable light upon the maxims of the preceding administration; and the promises which the King here made he also kept in the main, by returning to the prudent principles of government of the Conqueror. Like the latter, he avoids the re-grant of territory and judicial powers to the great vassals on any large scale. He centralizes the financial control in the Exchequer, facilitates the access to the Curia Regis, in other directions enlarges the competency of the county courts, and amplifies the charters of freedom of the cities and guilds. By the circuits of his Justiciary and the Commissaries of the Exchequer he brings the royal jurisdiction into immediate connection with the provincial administration, in a manner which obviates the danger of a territorial separation of the manors.

Next follows the reign of the usurper Stephen, to the exclusion of Henry's daughter, the Empress Maud, who had been formally appointed to the succession. Stephen's cavalier-like frivolity endeavours to gain the favour of the vassals by extravagant grants of Crown lands, and by laxity in administering the laws of the land. But so soon as the possibility of winning more adherents by this means is exhausted, the defiant opposition of the Barons begins. Even the peaceable magnates and Bishops saw themselves forced in self-defence to fortify their castles, and to prepare for war. In this critical moment Stephen commits the folly of arresting his Grand Justiciary and Bishop Alexander, by which act the clergy are provoked to opposition, and at the same time an orderly political administration altogether ceases. Neither Stephen nor the Empress has any real support in the popular feeling, whilst barons and knights fight nominally under the flag of one of the two claimants, but in reality for their own landed interests. From this time, instead of the former well-ordered administration of the realm, there is seen all the confusion of the continental feudal system—private wars,

fortified castles, the forcible exercise by greater and lesser barons of self-arrogated judicial functions, and of the privilege of coinage—a wild struggle of warriors among themselves, under pretence of siding with Stephen or with Maud, until, by the mediation of the clergy, a compromise is effected in favour of the succession to the throne of Henry, son of Maud.

Henry II. ascends the throne without opposition, and without any obligation towards either party, with the resolve to rule England as an English King, together with his great possessions on French soil. The basis of government and of the county administration created by William I. and Henry I. now received a systematic form. By the union of the royal central administration with the national county courts, the power of the great vassals was driven back into proper limits, and with the support of an energetic and loyal official nobility, the formation of which had begun as early as the reign of Henry I., with the appointment of Roger, Bishop of Salisbury, the Norman administrative system attains its unequalled systematic development. Even amidst the unfortunate family relations and unfavourable external conjunctures which characterized the latter years of Henry the Second's reign, the internal organization of the Exchequer and the Curia Regis, and that of the legal, military, and financial system makes consistent progress. And so also under that knight-errant, Richard I., the internal government, under the conduct of sagacious officers, pursued a course that was in the main orderly; until under the worthless rule of his successor, John, the crisis supervened, which led to the signing of Magna Charta.

Within this framework is accomplished the internal consolidation of a political system, which stands unmatched in Europe in the Middle Ages.

CHAPTER IX.

The Norman County Government.

The Conqueror found on his arrival, a well-ordered division of the country into Shires, Hundreds, and Manorial districts, and a corresponding official system of Earls, Shir-gerêfas, royal and private Gerêfas. For King Eadward's legitimate successor the retention of this system was a natural condition, and a few years' residence in England must have sufficed to convince the Conqueror that his rule could have no more advantageous basis than the Gerêfa-system he found there. The outward fabric of the government of the country thus remained unchanged, but it was enlarged by the new powers that had their origin in the feudal system, whilst in many points it was at the same time limited by the centralization which soon began.

I. The office of **the Eorl** had, in the last two generations of the Anglo-Saxon period, been reduced into the position of an upper governorship, with an ever changing combination of shires, and a frequent change of officials. According to the custom of the country, it involved the highest secular rank, corresponding to the ducal title of the Continent, and continued to do so until the reign of Edward III., for the "*duces*" of Normandy naturally avoided giving their subjects the title of "*dux*." A few Anglo-Saxon Eorls retained their earldoms for a considerable period. In the place of the rebellious Eorls, Norman great-feodaries were appointed. Certain lords apparently received the title of Eorl, only because, in Normandy, they had already been Counts. Usually, though

not always, a high military rank was attached to the office, which was conferred by a special ceremony, that of girding with the sword (*gladio comitatus cingi*), but no active command was attached. The rights and profits of the Eorl, *i.e.* the customary third of the revenues of the county, were at first usually combined with it. But the conspiracy of the Earls in the year 1074, showed plainly enough how dangerous an administration by Earls was to the royal rule. From that time onwards the appointments were made with great reserve; only such persons received them as had already borne the title of "count" in Normandy; in later times mostly members of the royal family; and in such a manner that the Eorl was removed as far as might be from the actual administration of county affairs. The former administrative office passed into one of the highest dignity, with many honours, but with as few duties as possible. In Domesday Book are recorded the names of ten *comites*, and a like number of *comitissæ*. The greater number of counties accordingly had no *comes*. Wherever we meet with one, no jurisdiction is attached to his person, no command in the army, no authority in the county court, and no special magisterial power of any kind. The Eorl is connected with the county, whence he has his name, in no other way than through the "*tertius denarius*," under the sheriff's yearly lease. The earliest Treasury accounts show the payment of such sums, amounting to £11, £16, £20, £33, etc., under the head of *tertius denarius*. But it is only a *donatio sub modo*, the grant of a permanent income "for the better support of the dignity of an Eorl;" it consists in a mere order for payment or precept addressed to the sheriff, and is therefore a right of demand, but no feudal right, and is accompanied by no investiture. Occasionally the Eorl is also appointed as sheriff, even in his own county, as Cospatrick was under William I. An Eorl of this character must render his accounts to the Exchequer, like any other sheriff, and he is only permitted by warrant to retain the *tertius denarius* (Madox, ii. 164). An Earldom has thus already the character

of the later titles of nobility; the same vagueness in the names, which are sometimes taken from a county, and sometimes from a city (such as Salisbury, Winchester, Carlisle), sometimes from a township (Striguil, Clare), sometimes from family names (Warenne, De Ferrers). The newly created earl was sometimes allowed a *tertius denarius*, sometimes a fixed annuity, and in later times neither the one nor the other. The dignity sometimes descended to women, and sometimes not, according to the wording of the grant; which from the first appears to rest upon patent. To this rule of government only a few exceptions were made in the border counties (the so-called counties Palatine) which had no influence upon the system of county administration. (1) After the withdrawal of the Eorl, the Anglo-Saxon Shir-gerêfa

(1) As to the dignity of the Norman Eorl, see Spelman's "Glossarium," *s.v. Comes;* Selden, "Titles of Honour," iii. 638, *et seq.*; Heywood, "Ranks," p. 95, *et seq.;* Madox, "Exchequer," ii. 400, *et seq.;* "Baronia Anglica," i. c. 1; Hallam, "Middle Ages;" Ellis, "Introduction;" "Peerage Reports," iii. 178, 211, *seq.* The dispute of the antiquarian authorities as to when the dignity of Eorl became merely titular is rather a controversy of words. We certainly cannot speak of a mere titular dignity in the case of those *comites*, to whom a third part of the court dues, fines and other revenues, had been granted. (As to their extent, see Heywood, 100, 101, 108.) The decisive question is, how far the Comes as such, had a military command, and how far he controlled the county assembly, and the peace of the county. That he had these powers, upon reference to the governmental documents, must be most decidedly denied; as to the instances in which a Comes governs the county as Vicecomes, see Madox, ii. 400. A local exception is made after the Conquest, in the county of Chester, in which, having regard to the necessity of defending the frontier, a general governor was intrusted with the immediate exercise of the *jura regalia*. After the reign of Henry II., such exceptional cases were not unfrequently called "palatinates." Extended powers of this kind were further granted in Shrewsbury, on the Welsh borders, in Durham, on the Scottish boundary, and in Kent, in consideration of the threatened invasions from Picardy. Two of these palatinates were intentionally combined with ecclesiastical dignities which were not capable of establishing an hereditary family succession. Such governors are generally called Earls, but frequently otherwise, as in the case of the Marchers of Wales; and where they bear the title of Earl, it is only the latter that is hereditary, whilst the governorship is regarded as a perfectly separate grant ("Peerage Report," ii. 255). Under Stephen, new *Comites* appear to be created in great numbers, and with extended powers; but these pseudo-earls were deposed under Henry II. For the origin of the later Palatinate of Lancaster, there were personal reasons in the striving of this house to preserve to itself a family possession, in addition to the crown it had usurped. All these variations, of comparatively small extent, had no determinate bearing upon the constitution of the country. The character of the Eorl, as an originally personal dignity, is recognized by the "Peerage Report," iii. 178, 211, 212, etc.

became the regular governor of the county, who was henceforth no longer dependent upon the Eorl, but upon the personal orders of the King, and upon the organs of the Norman central administration.

II. The important office of **the Norman Vicecomes** is identical with the old office of Shir-gerêfa, now filled by trustworthy Norman lords. Upon French soil there existed a similar system of government under Bailiffs; who as representatives of the duke, himself invested with the Carlovingian dignity of count, bore the title of "*Vicecomites.*" The official Latin in Norman England adopted the title Vicecomes, but this did not become naturalized in the Saxon vernacular. The Norman term "bailiff," which nearly corresponded to the Saxon "gerêfa," was in later times applied rather to the under stewards of the Vicecomes. For the governor of the county, on the other hand, the native population retained the usual name, Shir-gerêfa, Sheriff, which consequently, in later times became the prevailing one. Corresponding as it did to the Anglo-Saxon administrative system, the office of Vicecomes was a four-fold one.

1. As the King's *military representative* his duty was, in conjunction with the county assembly, to regulate the apportionment of the contingents, and conduct the detail business of the military organization. This business became somewhat simplified after registers could be kept with the help of Domesday Book. The sheriff's duty is accordingly, with the aid of such registers, to carry out the royal orders summoning the vassals, which orders are issued to him as executive officer. Where a royal castle belongs to the county, he looks to the equipment of the knights, the serjeants, and foot soldiers, as well as to their supplies, debiting the treasury with all the disbursements. In case of need he also manages the fitting out of ships. In the border provinces he conducts the defence of the county, in case no governor with larger powers has been appointed. After the revival of the old militia system under Henry II., he becomes also leader of the county militia. Wherever for military, judicial, or finance purposes, military

administration becomes necessary, it is the sheriff who does the work.

2. As *Royal Justiciary,* the Vicecomes is the successor of the Anglo-Saxon Shir-gerêfa; he presides in the county court, and holds the customary court-days at stated periods in the county as well as in the hundreds. The judges are the county freeholders. Instead of Thanes and freeholders, we now find vassals, under-vassals, and freeholders; and Normans instead of Saxons. So far the judicial administration was able to survive with its framework unchanged. But defective administration of justice and other circumstances led by degrees to a centralization at the royal court, which deprived the Vicecomes of much judicial business; whilst on the other side, the police spirit of the new regime made the criminal sittings the chief business in the several hundreds. In all cases the customary execution of all judgments, the collection of fines, and the confiscation of forfeited lands, remains the province of the Vicecomes.

3. As *Police Magistrate* of the Crown he performs the customary duties of maintaining the peace, pursuing peace-breakers, if necessary, with the "hue and cry" of the whole county; he accepts security for good behaviour, and controls the general surety-system of the tithings. Through the necessities of the times these police functions became much extended, and developed into what was soon an unlimited system of police fines. For carrying out these measures, periodical police-court sittings were instituted in the several hundreds under the name of "*turnus vicecomitis*" and "*visus frankplegii.*" The more the judicial functions of the sheriff become curtailed, the more prominent is his character of police official.

4. His office finally as *Bailiff of the royal demesnes* (gerêfa) develops into one of high importance, owing to the form of the Norman administration. As in the Anglo-Saxon period, the management of the royal demesnes is now entrusted to the Vicecomes to administer them as a steward within his district. He takes over these demesnes with the stock upon

them, he makes good the deficiencies as they occur, and covers his disbursements by deductions from the rent according to a fixed scale (Madox, ii. 152). In many counties the remainder of the estates which had been assigned to the Saxon Shirgerêfa to provide his official income (reeveland), were added thereto. The sum total of these estates forms the "*corpus comitatus*" out of which the annual rent due to the King was primarily payable.

In later times, when the "*corpus comitatus*" had become greatly diminished by grants (*terræ datæ*), he only accounts for the "*remanens firmæ post terras datas*," and this too was frequently burdened with current annuities and pensions, which had also to be deducted. An important part of his receipts is formed by the payments made by the tenants to their royal landlord. The payments in kind, consisting in corn, provisions, conveyances, and manual services, appear in Domesday Book as having in great measure been already converted into money, and according to the system pursued by the Treasury, this conversion proceeds, until as early as the reign of Henry I. it has become the rule. To these again are added the customary rights to wrecks, treasure-trove, and the other occasional sources of revenue of the old regal finance, and also (in the province of the magisterial functions) the rights to escheated and forfeited property, to various dues and fines, and to the confiscation of the movables (*catalla*) belonging to executed or fugitive criminals.

The revenue accruing from such suzerain rights was extraordinarily increased by the introduction of the feudal system, and these accretions were more vigilantly guarded by the Norman kings than by their predecessors. The feudal system added *relevia* and other similar incidental revenues, the large pecuniary value of which led to their being payable directly to the court. At the time of Domesday Book the maxim held good, that only vassals (*taini*), who possess six *maneria* or less, should pay their *relevium* to the Vicecomes. Those possessing more than six *maneria* pay immediately into the

Exchequer (at all events this principle is expressly mentioned in two counties). Do. 280, b. 298, b. (2)

To deal with the numerous financial and judicial duties, an official system became early established, with its clerks (*clerici*), in whom we recognize the ancestors of our under-sheriffs. The sheriff charges his under-bailiff with the duty of collecting the dues and rents, with distraints and summonses in the several districts (*Ballivi Hundredorum*); and further appoints working officials called "bailiffs" or "*servientes*" to attend on him and act as messengers, and also travelling under-officials or bailiffs errant. Altogether the financial position of the sheriff between the Treasury and those from whom payment was exacted, became soon so complicated, that (as in many German states of the middle ages) a "farming" of the office of sheriff arose, with a view of turning the uncertain revenue into a fixed state income. Certainly there are to be found among the sheriffs both farmers (*fermors*) and administrators (*custodes*); the difference between whom consists in the manner in which they render their accounts. But "farming" becomes the rule, and in many reigns can be proved to have prevailed in nearly every county. The appointment was sometimes for a quarter, or for half a year, but generally for a year—not unfrequently too for a number of years; but yet always reckoned from year to year, and revocable at the pleasure of the King. The rent is frequently the same that the predecessor paid (*antient ferm*), or the old sum with an

(2) I shall refer again to the Norman Vicecomes in his character of military commissary in cap. 10. His special duties in furnishing garrisons for the Burgs arose from the fact, that the feudal service of forty days was insufficient for the purpose, and that paid standing garrisons were absolutely necessary. Hence the frequent payments for *milites* and *servientes*, for horse soldiers and foot soldiers in the Burgs; and more frequently still in the campaigns. (Dialogus de Sc. Madox, ii. 422; Madox, i. 220, 370, etc. where a disbursement of £1228 is mentioned.) The Vicecomes as justiciary is again referred to in cap. 11, and his position as police magistrate in cap. 12. The mention made of his police functions in the legal books of this period is precisely the same as that of the Shir-gerêfa in the Anglo-Saxon period, *e.g.* in regard to the peace that he had to proclaim, Hen. 79, sec. iv.; as to summonses, Hen. 41, sec. v.; to distraints, Hen. 6. 51; sec. iv.; complaints relating to theft, Hen. 66, sec. ix.

The *leges Wilhelmi* especially confirm the old police functions of the Shir-gerêfa. I shall refer at length to his financial duties in cap. 13.

additional payment (*increment*). The Exchequer accounts show that a formal rivalry in bidding took place. Once, for instance, the Chancellor, the Bishop of Ely, bids for the counties of York, Lincoln, and Northampton, 1500 silver marks down, with 100 marks additional in subsequent payment; whilst the Archbishop of York bids for York alone, 3000 silver marks down, with 100 marks additional payment.

The farmer-general had at the same time to produce respectable men to the Treasury, as sureties for the rendering of an account that was now strictly controlled. Twice a year, at Easter and Michaelmas, the sheriff appears in person before the Treasury. These are the two *scaccaria*, meaning terms for payment, which were previously announced to all the Crown debtors in the county. At every term a proportion of the rent, and other sums due, "*summonces*," have to be paid down as a provisional payment ("*profer*"); then with the presentation of the receipts follows the "*visus compoti;*" and in conclusion the "*summa.*" Often, special commissioners were deputed to investigate the conduct of sheriffs who had exacted payments without giving receipts, or had committed other irregularities. (2[a])

(2[a]) With regard to the rendering of accounts by the Vicecomes, the "Dialogus de Scaccario," ii. c. 1, 2, 4 (Madox, ii. 407–16), gives the systematic principles obtaining in the time of Henry II. The writ of summons to present accounts runs: "*Vide sicut te ipsum et omnia tua diligis, quod sis ad scaccarium ibi vel ibi, in crastino Sancti Michaelis, et habeas ibi tecum quidquid debes de vetere firma vel nova, et nominatim hæc debita subscripta.*" Then follow the several items. Under certain circumstances it is expressed in sharper terms, "*alioquin sic te castigabimus, quod pœna tua aliis Ballivis nostris dabitur in exemplum.*" (Madox, i. 356.) Representation in delivering accounts is only allowed by special royal mandates, in later times by special permission of the president. It was imperative that at least one *miles* should be amongst the substitutes, and not only "*clerici*," "*quia, non decet eos pro pecunia vel ratiociniis comprehendi.*" (Madox, ii. 415.) In cases where the person from whom the accounts are due is a vassal of the Crown, short process is made, with distraint on his fief or personal arrest, but a *miles* is to be kept in decent imprisonment. An administration of the whole office by substitutes can only be allowed by special Royal licence. In the Rotuli 5 John a "*subricecomes pro cancellario*" is met with in this office. But other considerations are also entertained with regard to money payments. In 12 John the men of the county of Dorset and Somerset pay 1200 marks in silver, "*quod Rex constituat eis Vicecomitem de se ipsis talem, qui residens sit in comitatibus illis, excepto W. Brieverre et suis,*" etc. An objection of this kind to certain persons as sheriffs is not unfrequent. In this way the first separate cases occur, in which an election by the county of their sheriff is allowed in return for a money payment.

The collective office of the sheriff, as war commissary, summoning the lords and knights; as treasurer, through whose purse the finances of a small province pass; as police magistrate, having to execute judgments and maintain the King's peace against the mightiest in the land, clearly shows that, according to the notions of those times, only a Crown vassal or a skilled ecclesiastic was capable of administering such an office. The Norman lords despised no positions of gain. Hence we find at times kings' sons among the sheriffs (for instance, Richard, the son of Henry III.); the great justiciaries of the realm, and other high Court officials; the Archbishops of Canterbury and York; numerous Bishops; and sometimes even a highly placed Royal Chaplain; but most frequently the names of Norman lords occur, to whom the office of sheriff afforded a lucrative income in addition to their landed property. Yet the system varied under different reigns. Careless monarchs allowed the magnates to seize the sheriff's office; in a few cases the office was even allowed to become hereditary, although the personal responsibility was retained. But it was not until the reign of Henry II. that the office became systematically filled from the ranks of the newly formed official gentry; in the last years of this reign it was filled from the same class of officials as the barons of the Treasury and the travelling commissaries. In spite of the important position it afforded, the office remained at all times a purely personal one, dependent entirely upon the will of the King, and therefore revocable. The King had accordingly the power of separating from it several branches. Thus we meet in early times with special "foresters," "customers," "escheaters," "farmers" of towns, guilds, etc., and in later times special collectors of the *tallagia* of the fifteenths and other subsidies. The King had also the right to commit his burghs to the care of special burgh-bailiffs, with or without a judicial and financial jurisdiction within the burgh-district. He could also divide the judicial authority in certain districts, and grant exemptions to towns, etc.; all these special administrative branches the sheriff must support

with his authority, whenever distraints and executions are to be put in force. The King could also introduce modifications into the conduct of the office; for example, by permitting the controlling power in extraordinary cases to be exercised by substitutes (*e.g.* for clergy in military matters). And he could finally on this account depose the sheriffs, singly or collectively, a popular measure repeatedly resorted to in the twelfth and thirteenth centuries. He might suspend them at any time from office, place *custodes* over them, investigate their conduct by commissioners, regulate their behaviour by instructions, and impress their duty upon them by new oaths of office. As in the Anglo-Saxon period, there cannot be found any trace of a right to the office, or of a right of the county assembly to appoint to it, nor of an appointment by election.(2[b])

III. The Local Government of the Sub-districts within the county is still principally regulated by the nature of real property in just the same manner as under the Anglo-Saxon gerêfa system. Through the Conquest and the feudal system arose a change of occupiers of the soil, and with the change in persons a new grouping of possessions; but the old system of property was in the main retained. The descriptions of the estates in Domesday Book reproduce the modes existing at the close of the Anglo-Saxon period, under the partly new names of "manors," "honors," and "burghs."

1. The *manor*, "*manerium*" or lord's seat, is identical with the "*mansus*" of the Anglo-Saxon period, comprehending

(2[b]) Of the personally high position of the sheriff numerous instances are given by Madox. In the "Dialogus," ii. c. 4 (Madox, ii. 417), it is, however, expressly stated that the Vicecomes need not be a vassal of the Crown. In later times the official instructions of the Vicecomes are numerous; for instance, in 42 Hen. III., an universal oath of office is prescribed, which throws much light upon the spirit of the administration. The sheriffs must swear that they will impartially and promptly grant justice to the poor as to the rich man; that they will accept nothing personally or through others, except food and drink for a single day; not to quarter themselves on any one with more than six horses; to lodge with none who is worth less than £40 income from real estate, and not more frequently than once a year or twice at most, if invited, and then without making a precedent of it; to take no present exceeding twelve pence; not to take more servants with them than necessary for their safety on circuit; to see that these servants do not overburden the land by eating and drinking, or take from any inhabitant sheep, corn, wool, movable goods, money, or money's worth. (Madox, ii. 147.)

the ceorls and dependants who had settled round about it, who for the most part form a union of neighbours, *villa, villata.* Under the new tenure, the real rights of landed property have not changed their nature as fiefs. The newly enfeoffed Norman, alike with the Saxon Thane who remained in possession, exercises the usufructuary rights of his predecessor, that is, collects the customary dues through the managers of his estates, *præpositi villæ,* reeves, bailiffs, or stewards. In the system of police-sureties the *villa* forms a lord's tithing, where it contains ten or more families. The landowner claims the customary jurisdiction over his people, together with the extensions of it that have taken place by grant, all of which are enumerated in the deeds of grant under the denominations "saca," "soca," "infangtheft," and "outfangtheft." It was merely a new name when this was now called, in the language of the Norman lords, a "manor," a name which first appeared with other Norman fashions under Eadward the Confessor. The majority of the manors were now in the hands of Crown vassals; a considerable number also former Saxon Thanes. (Ellis i. 90.) The Norman Government endeavoured to reduce all these judiciary powers to one uniform system, but certainly not to extend them (*vide* chap. x.). The Domesday Book, indeed, shows a number of new manors which had been created by division, but in the year 1290 the statute "*Quia Emptores*" put an end for ever to the creation of new manors. (*a*)

2. *The formation of lordships* (Honors) also reaches back into the Anglo-Saxon period, originating in a group of estates lying close together, over which, in the system of police-sureties, the stewards (*præpositi*) of several lords presided

(*a*) Touching the manors the Glossarium of Sumner says as follows: "*ante Normannorum tempora vox apud nos, in chartis aut aliis nostris bonæ fidei monumentis, frustra quæritur. A Normannis (inter alia ejus farinæ verba) e Gallia huc adductum conjicio, quorum in Anglia præcessoribus Hida, Familia, Villa, Sulinga, Casata, Mansura, Manens (ut Mansus, Mansio, Mansum, Colonia, et eis, et exteris simul) idem significarunt, ac ipsis et aliis posterioris ævi populis Manerium.*" (Ellis, i. 224, 225.) As to the technical meaning of the words "saca," "soca," "infangtheof," "team," "toll" in the deeds of enfeoffment, see the treatise of Zöpfl, "Alterthümer des Deutschen Rechts" (Leipzig, 1860), i. pp. 170–211.

—to which lordships were often given a "saca et soca" in an extended measure, and which were in certain matters co-ordinated with the hundreds. The successors of the Saxon great Thanes are now Norman lords, who, following the fashion prevailing in their old home, strove to form exclusive feudal lordships out of these unions. We find in England round certain magnates a small court, a steward (*dapifer*), a butler (*pincerna*), a marshal, a chamberlain, etc.—their offices being sometimes even hereditary. The numerous *venatores*, and half a hundred other classes of higher and lower servants mentioned in Domesday Book, point to the fact that inferior vassals of the Crown also imitated this custom. The Normans, fond of pomp, herein vied with the princes of the Continent. But the Conqueror had taken care to assign their possessions to the greatest feudatories in so many counties, that their estate in each county did not differ greatly from that of the inferior vassals of the Crown. They were not able, either locally or temporarily, to consolidate themselves, since the strict law of escheat often brought the same possession back to the Crown several times in a single century. And then the interest of the financial administration pre-eminently kept these greater formations within limits, and, where a favourable opportunity offered, endeavoured to suppress them. The principal seat of the lord, the "*caput baroniæ*" of later times, might indeed be a meeting-place of the under-vassals for festivities, investitures, legal business, and the holding of manorial court days, but it was not a superior feudal court in the French style. The Norman manors are rather mere unions of estates, which are all granted, transferred, and administered alike, but have not specific sovereign rights attached to them. After the frequent escheats the "honors" which had thus fallen in were often re-granted, diminished in extent, so that later Treasury accounts distinguish expressly between lordships of old and of new tenure. Finally, the prohibition to create new manors also prevented the formation of new honors. (*b*)

(*b*) The appellation "honor" is also merely a new name for an old institution. Heywood, pp. 188, 189, rightly points out that, where in Domesday

3. *The Norman Burghs* are in like manner a continuation of the special parochial and judicial districts, which had been formed, in the Anglo-Saxon period, around a fortified building or a castle. Many were severely dealt with and laid waste at the time of the Norman Conquest. William I. took them over with their legal constitution, and incorporated the more important of them immediately with the royal demesnes. A list of them, about eighty in all, is given by Ellis (i. 190). A number of such places, which already in the Roman times had been *civitates*, continued to be called "cities," which name, however, has no reference to their constitution. In the county system they often form a hundred, and sometimes form several, as where an old and a new town are united together. Like the counties generally, the royal cities, burghs, and towns were treated as special estates, and either incorporated with the *corpus comitatus* or given over at the royal pleasure to special "Fermors" or particular town bailiffs, *custodes*, provosts, etc. The Empress Matilda, for instance, farms out London for £300 rent to Geoffrey of Essex. Where in greater cities several special guilds existed, these again might be the subject of under-leases. For example, in 5 Henry II. the Weavers of London pay five marks in gold as rent for their guild for two years; the Bakers one mark and six ounces in gold; in 11 Henry II., the Weavers twelve pounds silver, and the Bakers six pounds silver "*pro gilda sua*;" and in like manner the guilds in Oxford and in other places. It will be shown later on how the feudal system began to compel the real estates not subject to the feudal military service, to periodical contributions in cases where the honour and the needs of the feudal lords required

Book the word "honor" is in certain cases met with, it is used alike for the land and for the fief of ordinary vassals. It was not until later times that it was used in preference for the great fiefs: "*Possessiones magnas, quas vulgo vocant honores.*" (Henry Huntingdon, "De Contemptu Mundi," c. 23.) Probably the expression became a technical one in the Treasury. So far as I can discover, the name "honor" is used in the Treasury accounts after the time of Henry II. for the great possessions of earls, of the High Constable, and of some few great vassals. The collection of laws, which was made about the same time, that of the Leges Henrici I., certainly uses the word for those possessions, to which several *maneria* belong. (H. c. 55.)

it. Under the name of "*tallagium*" a taxation of this kind was imposed according to necessity, and as a rule only repeated at several years' interval. It was raised either from individuals or in gross; in the latter case the households bound to contribute agreed together, in their common pressing interest, how it should be raised. Frequently already existing guilds of merchants, tradesmen, and house or land owners undertook this duty of raising the *tallagium* in consideration of especial privileges. But it was still simpler when, instead of the sheriff, whose accounts had without this become complicated enough, the "men of the burgh" themselves undertook to farm it. The King then demands his "taille" from the body of citizens, or from a smaller guild which has undertaken the duty, but no longer from the individual, whose possessions in this manner become again tax-free. In this case a fit and proper person is presented to the Treasury, who, on being appointed "town-reeve," undertakes with sureties the responsibility for the due payment of the rent agreed on, and collects from the individual the dues and imposts. The official thus appointed is known throughout by the title of "reeve," or "bailiff," in later times also by the Norman name of "mayor." For some time an eager competition took place between the citizens and the Vicecomes or some other lord anxious to outbid them. In process of time, however, the majority of the towns farm themselves, "*firma burgi*," "fee farm," and thus gain the first step towards their independence. By a charter of Henry I. even the sheriff's office for the county of Middlesex is, according to this system, farmed out to the city of London, "*ad firmam pro CCC. libris ipsis et heredibus suis ita, quod ipsi cives ponent vicecomitem, quem voluerint de se ipsis*," etc. ("Select Charters," p. 103.)

Even in the Anglo-Saxon period the city of London, standing as it did in regard to population and extent of possessions, on an equality with a county, by annexing Middlesex, had gained for itself the position of a county. Its "wards" may be compared with the hundreds. On the accession of

Richard Cœur-de-Lion to the throne, instead of the port-reeve, two bailiffs appear as town-reeves, and soon after this a mayor, whose free election (nomination) was granted to the citizens by charter (10 John). After Richard I.'s reign more extended privileges for other cities spring up, such as privilege of market, new guilds, a separate jurisdiction, and free election of their own officials. From the *firma burgi* connected with a separate jurisdiction, proceeds the English municipal law, which at the close of this period stands before us developed in clear outlines, but which only presents a number of immunities with no special participation in the general government of the county.

The separate government of the burghs was in the Anglo-Saxon period especially seen in the case of the royal demesnes. Besides these appear also the mediate towns as a part of the possessions of the great feudatories, though certainly in small numbers and of small extent, in which the lord of the soil collected for his own benefit the customary rents and dues, and held his court. The burden of contributing according to the needs of the lord attached also to the persons of the inhabitants, and occasionally comes to light whenever, in consequence of escheat or feudal guardianship, such places temporarily pass "into the King's hand," and are so entered on the Treasury rolls. This right of levying contributions became, as everywhere, a cause of oppression, grievance, and disturbance. How it was exercised by the Norman lords we may judge from the fact that the towns frequently disputed the lords' right, and declared themselves liable to pay contribution only to the King. For this reason the King appears early to have protected these places against ill-usage. The very frequent mention of a special royal licence points to a general control exercised by the Treasury over these *tallagia*. When lordships escheated, as so frequently happened, the reservation was always made in the new grant of them "that such places should only pay *tallagia* when the King taxed his own" (Madox, i. 756). What after this still remained of the lords' right of levy-

ing contributions, finally disappeared generally through purchase. (*c*)

It is beyond doubt the finance administration which has before all else influenced the form of local government. In the interest of a uniform financial control the royal manors and the groups of estates were now left to the administration of the Shir-gerêfa in a still greater measure than in the Anglo-Saxon period, so that manors and honors pre-eminently appear as lordships in the possession of private landlords. In the burghs, on the other hand, which were a bounteous spring for the replenishment of the royal exchequer, a royal special government prevailed, and was constantly endeavouring to form independent communities in consideration of heavy money payments.

(*c*) As to the Norman burghs and the gradual origin of municipal law out of the fusion of the modes of taxation of the *firma burgi* with the grant of a police jurisdiction (court leet), see in detail Gneist, "Geschichte des Self-government," pp. 104–112, and Stubbs, i. cap. 11. sec. 131. Relying upon the great mass of records contained in Merewether & Stephen, "History of the Boroughs," 3 vols., 1853, I differ in some particulars from Stubbs, and hold to the view, that the basis of the municipal law is the grant of a separate municipal court, and that the right of citizenship is hence normally extended to all resident citizens, who share in bearing the burden of office, and paying the municipal taxes, "resident householders, paying scot, bearing lot." The favourite modern idea, of making political creations proceed from groups of social interests, has given an exaggerated importance to the guild system of the English towns. The so-called "*judicia civitatis Lundoniæ*," as also the guilds at Cambridge, Canterbury, Exeter, and elsewhere, are voluntary unions with certain limited ends and objects in view, which have often an importance at the first origin of the *firma burgi*. The Municipal Court of Justice (the court leet) on the other hand, with its legal procedure, could not be limited to, or based upon, a private guild. That the mediate towns are a comparatively inferior creation, is proved by the rare mention of them, the insignificance of the places mentioned as such, and the small number of the baronial charters, when compared with 1500 royal charters, upon which is based the formation of the English municipal law.

In harmony with my deductions Stubbs says (iii. 559): "In 1216 the most advanced among the English towns had succeeded in obtaining, by their respective charters, and with local differences, the right of holding and taking the profits of their own courts under their elected officers, the exclusion of the sheriff from judicial work within their boundaries, the right of collecting and compounding for their own payments to the Crown, the right of electing their own bailiffs, and in some instances of electing a mayor."

CHAPTER X.

I. The Development of the Norman Military Power.

Upon the basis of the county government we have just depicted there ensued a change in the powers of the Crown, which shows with startling rapidity the material sovereign rights of the more modern polity. Primarily it is the military power which, under the influence of the Norman feudal system, presents new features in every direction. Once the weakest point in the Anglo-Saxon political system, it has now become one of the firmest bases of the Norman.

1. *The decision as to war and peace* was at the close of the Anglo-Saxon period still frequently made by the Witenagemôte, and claimed by it as a right whenever extraordinary services were required of the national militia. The limits of this right were, however, not sharply defined; it was at all events an established principle that the King could claim the right of personally summoning his own Thanes. This last-named right was now the universal one, since every vassal of the Crown and every under-vassal had become the King's *homo*. The military oath of fealty is now taken to the King's person, and holds good for his possessions abroad, "*extra regnum*" as is laid down in the Charta, Will. I. 3, c. 2: "*Statuimus ut omnis liber homo fœdere et sacramento affirmet quod intra et extra Angliam Willelmo regi fideles esse volunt, terras et honores illius, etc., defendere.*" ("Select Charters," pp. 83, 84.) This charter has, indeed, been enlarged with spurious additions by a later hand, but it is probably genuine

in substance. In any case feudal service *extra regnum* was enforced by all the Norman kings, and it was not until after the separation of Normandy from the English crown in John's time that cases of direct refusal occur. The Norman was obliged, in the interest of his own possessions, as well as in that of his countrymen in Normandy, and as a condition of his new possessions on English soil, to acquiesce in the condition imposed, that of serving the King "*intra et extra regnum.*" The Anglo-Saxon Thane had to be content if he retained his possessions on similar terms.

This was certainly the hardest requirement of the new order of things, and one that met with a strong opposition from the vassals. This fact explains the events fraught with such important consequences at the close of William I.'s reign. When in the year 1085 an invasion of the Danes was seriously threatened, the King, by means of a land-tax, brought together a huge paid army of different nationalities, and by heavy taxation and quartering of his soldiers suppressed the opposition that was still offered him. In the following year all the greater landed proprietors appeared willingly at the review held near Salisbury to acknowledge by one great act of homage, that all Crown and under-vassals were now the King's "men." And this act proclaimed that the newly formed feudal militia was no popular muster, but an army to be summoned by the King. At the same time the royal prerogative of deciding the question of war and peace was established for all time. As an extension of this, the right of building castles was distinctly recognized as a royal privilege. The "*castellatio sine licentia*" is from that time forward an offence threatened with the "*misericordia regis*" and severe penalties (Hen. I. 13, sec. 1; 10, sec. 1), and use was made of it in such an extensive manner that William's reign marked a decisive epoch in the defences of the British Isle. (1)

(1) For the Norman military system as a whole, cf. Gneist, "Geschichte des Self-government," pp. 61–68. Some useful matter is also contained in Grose's "Military Antiquities." See also remarks in the "British Military

2. The *equipment* of the soldiery and the *apportionment of the contingents* was in Anglo-Saxon times the subject of transactions between the sheriff and the county assembly. These transactions now assume a different form. The Domesday Book laid the basis of a roll of the Crown vassals. According to the extent and the nature of the productive property it could be computed how many shields were to be furnished by each estate, according to the gradually fixed proportion of a £20 ground rent. The burden of performance was laid in the first instance on the landed property of the Crown vassal. But since Domesday Book was drawn up, subinfeudation had increased, and the actual burden of performance was thus partly transferred to the enfeoffed under-vassal. The manifold subinfeudations, changes of possession, forfeitures, and divisions, were proved by the charters and writs preserved at court, by means of which the rolls were made to correspond with the actual state of affairs. But, in consequence of the

Biography" (2nd edition, 1846). The innovations are the strict personal service based on property, the uniform apportionment according to free possession of real property, and the complete enforcement of obedience, by the punishments for felony, and feudal penalties. This strict martial law was introduced from Normandy. It is true there did not exist a military code which could have produced a written Norman feudal law. But the feudal system had already become defined in its details by the regulations of the dukes, and by an early established legal and financial administration. And in Normandy, too, proceeding doubtless from the hierarchy of the feudal system, and from the position of a conquering tribe, a class-privilege had become developed in outline. The Franco-Norman feudal constitution of those times was based upon the seignorial idea, which made the great feudatory into an hereditary *Seigneur* over his under-vassals, and which in after-times, favoured by the influence of possession and similar interests, easily made this bond a stronger one than that which bound the under-vassals to their suzerain. In England an opposite condition of things existed. The possession of the Norman lords was a new one; the nationality and the interests of their Saxon under-vassals were opposed to theirs, and even their Norman *homines* were in the main collected from all parts. The Seignorial idea could not accordingly firmly establish itself here. The fortified places the Conqueror carefully reserved to himself. As the Conquest advanced the first care of the Conqueror was the building of a fortress in the conquered town. The exclusive royal right of fortifying castles, though doubtful in the Anglo-Saxon, is certain in the Norman, period. Of the forty-nine castles mentioned in Domesday Book, only that of Arundel is described as existing "*tempore Edwardi.*" The castles of Dover, Nottingham, Durham, and the White Tower in the Tower of London, in existence at that time, are not mentioned. This number of strong fortifications with, for the most part, standing garrisons, certainly exercised a severe pressure upon the adjacent country. The remembrance of the Norman "castle-men" remained throughout the whole of the Middle Ages.

numerous disputed cases and varying conditions, a permanent roll of tenures was never drawn up; accordingly, the number of shields to be furnished was never officially determined. As far as we may conjecture by reference to later statements, the number of shields may be fixed at about 30,000.*

But the Vicecomites were doubtless in possession of the official treasury lists for their county. There was therefore only now needed a personal order of the King issued to the Crown vassals, and at the same time to the under-vassals, who for the purposes of the summons to arms are also "*homines regis.*" But since the duty of furnishing, equipping, and provisioning the troops belonged to separate estates, this business had to be undertaken by the government of the county. It was impossible to issue thousands of personal orders directly to the individual vassals, nor were the great feudatories the right persons to be addressed, as their possessions, and with them their under-vassals and horsemen, lay scattered about in many counties. According to the rolls in Domesday Book, the estates of about 130 secular vassals of the Crown were situated in from two to five counties; those of twenty-nine lords in six to ten; those of twelve great lords even in ten to twenty-one counties, and the possessions of the great ecclesiastical vassals of the Crown were distributed similarly to these (thirty in two counties; about thirty in three counties; about six in from three to eleven counties). The procedure consisted in a mobilization order addressed to the Vicecomites, and couched in the following form: "*Vicecomiti Kanciæ salutem. Præcipimus tibi quod sine dilatione summoneri facias per totam ballivam tuam Archiepiscopos, Episcopos, Abbates, Priores, Comites, Barones, Milites, et libere*

* See above, p. 130 *note*, the statement of Segrave under Henry III. In the *liber niger*, the number of knights who could be furnished by the vassals of the Crown in the ten counties south of the Thames, is given at only 2047, and these counties apparently contained a fourth of the whole population. The official computation, according to which the scutage at the end of the thirteenth century was calculated, is based upon an estimate of 32,000 knights'-fees; but the amount of money really raised fell far short of this estimate (Stubbs, i. 432).

tenentes, et omnes alios qui servitium nobis debent sive servitium militare vel serjantiæ: quodque similiter clamari facias per totam ballivam tuam, quod sint apud Wigorniam in crastino S. Trinitatis anno regni nostri septimo, omni dilatione et occasione postpositis, cum toto hujusmodi servitio quod nobis debent, parati cum equis et armis eundum in servitium nostrum quo eis præceperimus. Eodem modo scribitur omnibus Vicecomitibus Angliæ." (Cl. 7 Hen. III. 3.)

The sheriffs then issued their proclamations to all burghs and market-towns, commanding the vassals to present themselves "at the risk of forfeiting their fees or of severe penalty according to the King's pleasure." In time of greater urgency, and out of courtesy, special commands could be issued in addition directed to the great Crown vassals and the prelates, and these commands were served by the Vicecomes. Every vassal of the Crown had to see that on his estates so many heavy-armed men were in readiness as according to the feudal list it fell to his lot to furnish. The preparations for equipment and provisioning had to be made beforehand on each separate estate, and it was the duty of the great feudatories in each county to make one of their under-vassals or household officers responsible for this. As the total number of the propertied Crown and under-vassals only supplied a portion of the shields required, the majority had to be furnished by the equipment of sons, relations, and free dependants (*servientes*, mounted servants). Since, moreover, the Norman army at all times needed not only cavalry but also masses of infantry, the vassals were readily content to furnish, instead of the superfluous horsemen, a corresponding number of archers or spearmen. The furnishing of contingents thus became much more a matter of detail, and had to be conducted according to the county-divisions. Neither at the time of equipment nor in the field, and perhaps not even at a review, could the soldiers of a great vassal have presented a fixed unity, and hence the vassal's position as hereditary captain (*senior, seigneur*) could not attain to the importance that it did on French soil. But all these trans-

actions were not matters on which the Thanes of the county were to be negotiated with as in the Anglo-Saxon period, but the vassal had to satisfy the royal officer that he had fulfilled the duties the feudal list imposed on him. (2)

3. The command over the collective feudal army belongs, as a matter of right, to the King, as was the case in the Anglo-Saxon period. All actual leaderships are based upon his personal commission. According to the cavalry system of the feudal militia, the collected troops keep their own "*comes stabuli*" and their "*marescallus*," as at the present day their adjutant-general and quarter-master-general. The constable and marshal arrange the troops into divisions and companies, settle disputes as to precedence and field badges, in the field as in the tournament; keep the rolls of their men, and give certificates as to attendance, by which a proof is furnished to the Treasury respecting the feudal duty of each, showing whether it has been performed, bought off, or remitted. From these beginnings was developed a military jurisdiction derived from the King. But as every standing army strives to transfer to the civil community the military organization, the same was the case in a high degree with the feudal militia, service in which was based upon real estates.

(2) As to the recruiting of the tenants see Grose, "Military Antiquities" (i. 65). Thomas, "Exchequer" (p. 53). The orders issued to the sheriffs calling upon them to summon the troops appear to be uniformly framed. (Madox, i. 653, 654.) Failure to appear is in the case of the higher clergy only punished with heavy fines (amerciaments) — for instance, with sums of 100 marks in silver; in the case of secular vassals deprivation of their estates appears to be the immediate consequence. (Madox, i. 662, 663.) In addition to the personal service of the Crown vassal, the prescribed number of heavy-armed troops had to be furnished, for whom the expression "*servientes*" becomes gradually the prevailing one. (Heywood, 129.) As a proof of the fulfilment of military duty, either a certificate from the commander-in-chief would serve, or from the constable, the marshal, or one of his lieutenants deputed for this purpose, or the "*rotuli*" of the war office. (Madox, i. 656, 657.) Persons possessing a fraction of a knight's fee, do duty for a relatively short time; for instance, the half of a knight's fee is computed at twenty days each year. As early as in the twelfth century these sub-divisions extend so far as one-twentieth of a fee, in which case evidently only the honorary rights of the Crown vassal, and not his personal service, are concerned. That even clerics were sometimes summoned in person is proved by a writ (printed in Rymer), addressed to the bishops "*eo quo singuli, tam prælati quam alii in propriis personis venire debeant, ad defensionem coronæ et regni nostri*" (41 Hen. III.). As a rule it is only said that the prelates have to send "*milites suos.*"

The more the vassallage began to feel their importance as a great war-guild and dominant class, the more urgent was their demand to have their constable and marshal for the whole feudal army when upon the peace footing, as the feudal militia in Normandy had long had its hereditary constable and marshal.

After long hesitation this point was conceded. Under Stephen, perhaps even somewhat earlier, a *constabularia* and a war marshalship appear established for the whole feudal army, endowed with certain distinctions and fees. Over the army in the field, however, the King reserved to himself the personal command, in addition to the right of appointing the commanding constable and marshal. The official system extended to the inferior commands, to which the names "*constabularia*" and "constable" were universally applied from the highest ranks down to the lowest. Certain limitations only were recognized in respect of the appointment, by the King, of men chosen from the ranks of the greater, middle, and inferior vassals. The maintenance of these limits was rendered necessary by the indispensable military retinue which accompanied the higher commanders, and not less by the *esprit de corps* which was rapidly developing among the feudal militia. The skilled service of the cavalry required the practice and training of years, if possible even from boyhood. The system of knighthood, with its admission to full honours, and with the degrees of knight, esquire, and page, was after the Crusades uniformly developed in England. The tournaments flourished under Stephen and Richard Cœur de Lion. From the obligation to full knight's service naturally arose the obligation to take up the dignity of a knight, and from time to time royal writs were issued to the Crown vassals, "*ut arma capiant et se milites fieri faciant, sicut tenementa sua quæ de nobis tenent diligunt*" (Rot. cl. 19 Hen. III.). (3)

(3) As to the command of the feudal militia, see below, cap. 16, "the great offices;" and the "Peerage Reports" (iii. 199b). Beginnings of the guild system and the "master's rank" in the cavalry are found already in the Anglo-Saxon period. (Turner, "History of the Anglo-Saxons," iii. 73–75.) In the Anglo-Saxon records, "Cniht" is a tolerably frequent term for the mar-

Under the firm hand of a martial monarch this Norman feudal army presents an imposing picture, and comes into the foreground as the actual basis of the political and social system. With this military organization the Norman kings became, as none had been since the withdrawal of the Roman legions, lords of the whole land. This military force, assisted by the numerous and strong works of defence, dominates alike the western Britons and the northern neighbours, puts an end once for all to the Danish invasions, and turns England into a really united State, possessing in point of power the promise of a great future. In spite of all its outward pomp and personal bravery, this feudal army suffered from the defects inherent in all feudal militias—imperfection of discipline, tactics, supplies, and transport, and the want of weapons effective at long distances. It was also probably never collected together for important service, but was only employed in divisions and at long intervals in wars upon the Continent and border-wars, or to suppress isolated insurrections. But one thing was especially wanting in Anglo-Norman feudal soldiery, a characteristic feature of the feudal militia of the Continent—the "territorial" connection between the under-vassals and the great feudatories. This defect resulted not only from the scattered position of the great feudal estates, but still more from internal dissensions. For several generations the former Saxon Thane did but reluctant

tial followers. Still, a single instance of the conferring of the knight's dignity is no proof of a military system or a privilege of rank formed from it.

Not until the time of the Crusades is a powerful influence upon military and social life acquired by the knightly order. As to the royal ordinances affecting the tournament under Richard Cœur-de-Lion, see Lappenberg-Pauli" (iii. 280). This, moreover, as well as the custom of "dubbing the knight," is made a source of revenue. Out of the royal charters of the earlier Norman period, "*armis et equis se bene instruant*," the practice of the Treasury about the middle of Henry III.'s reign, deduced the maxim that every vassal, even the under-vassal, is as a *homo regis* bound to cause himself to be knighted at court, paying the fees for the dignity under a penalty for neglecting to do so. (Madox, i. 510.) Hence arose the curious circumstance that the taking up of the knight's dignity was regarded in England as a burdensome duty, and one which the majority endeavoured to escape, being contented with their dignity as "*scutarii*" (esquires) in the feudal scale of dignities, their maxim being "*sufficiens honor est homini, qui dignus honore est*" (Coke, "Inst.," i. 231, 233).

service as an under-vassal to the Norman lord who had been forced upon him. And with the majority of the Norman under-vassals the case was no better, they being a collection of Frankish horsemen and farmers, who now figured on English soil as lords, "rude upstarts, almost crazed by their sudden promotion, marvelling how they had attained to such a position of influence, and thinking they could do as they liked" (Ordericus, iv. c. 8). Real loyalty between the small and great vassals was thus, in the early Norman days, almost impossible; and with the decay of the royal authority under the usurper Stephen, the small vassallage broke up into a violent irregular soldiery. The military state still lacked national unity.

These weaknesses of the feudal militia, and the ever-recurring conspiracies of the great vassals, caused the revival of the old Saxon national militia more than a hundred years after the Conquest. Disunion in the royal family itself, the influence of the Crusades, the evil example of Normandy and France, and the dissensions with the Church, at that time all combined to make the feudal array an untrustworthy force, against which the King himself sought for some counterpoise. In accordance with the established principle of the Norman crown, the old right of summoning the national defence (fyrd) had never been abandoned. This force was once called together by William Rufus, although primarily only for the purpose of extortion. (Huntingdon, a. 5, Will. II.) In the North Country the national militia, under Archbishop Thurstan, had won the battle of the Standard against the Scotch, and again in 1173 the popular army of Yorkshire, under the command of the faithful barons, had warded off the Scotch invasion. This was followed (1181) by the new legal ordinance of the Assize-of-Arms (27 Henry II.), which contained the following provisions. Each owner of a knight's fee (not merely as tenant, but by virtue of the universal duty of the community) is to possess a suit of iron armour, a helmet, a shield, and an iron lance, and moreover every knight is to have as many suits of armour as he has knights'

fees. Every secular freeholder, possessing in movables or rents sixteen marks, shall in like manner possess a suit of armour, helmet, shield, and lance. Every freeholder of ten marks in goods or income shall have a breastplate without arm-pieces, an iron helmet, and a lance. All burghers and other freeholders shall have a stuffed jerkin and iron helmet, and a lance. Each shall swear the oath of allegiance, and that he will keep these weapons for service at the King's command, and in loyalty towards him. These weapons may not be sold or pledged. In the hundreds and hamlets district-commissions (consisting of men possessing not less than sixteen marks rent in land, or ten marks in movable property) are to be appointed, to assess property for the land army. Royal Commissioners are on their journeys to make lists of the names of those bound to this duty, and to swear them in to obey the royal "assize." Freemen only are mentioned, and it is expressly laid down that only freemen shall be permitted to take the military oath. Apparently officers (constables) had already been appointed in the several hundreds for this militia, which was a force not dependent on feudal tenure.

With the general summons of the *liberi homines* thus established—the national army revived on a new legal basis—there could also be combined the summons of the feudal militia, as was actually done in a case of great war-peril in the year 1217. ("Select Charters," 343.)

In another direction also, at about the same time, the national influence of the insular position of the country, the climate, and the mode of life made itself felt among a portion of the feudal tenants. The conquering race had long felt itself secure in its possessions. For more distant warlike expeditions upon the Continent a uniform levying of English feudal forces appeared neither equitable nor, in consequence of the short time of service, feasible. Hence, from the time of Henry II., remissions of feudal service began to be purchased. Varying at first, by degrees a scale for this so-called scutage (*scutagia*) became fixed; and thus the feudal military system

enters into the province of the financial control (see cap. 14), as the basis of a new system of taxation.†

† The origin of "scutage" in satisfaction of military service after the reign of Henry II. is carefully given by Madox (i. 625 *et seq.* and 642 *et seq.*). (See below, cap. 13, sec. vi.) In the second year of Henry II., for the first time, the Prelates were, on the occasion of a campaign against Wales, allowed to pay twenty *solidi* on each knight's fee instead of furnishing a horseman.

In 5 Henry II. the secular vassals also obtain permission to pay two marks for each shield instead of doing service. From this time a satisfaction of feudal service by *scutagia* becomes more frequent. Where small sums were demanded, the commutation appeared as a favour, which for a long time was not forced on the recipients. But later, when the taxes were fixed at a higher rate, and the demand for scutage was more frequently made, the time of Magna Charta drew near, when the King was obliged to consent to negotiate with his Crown vassals on the subject of assessing the *scutagia*. Different from this, and occurring both earlier and later, was the admission of a substitute in cases of special hindrance, as to which a money payment (fine) was mutually agreed on in each individual case, under the heading, "*ne transfretent, pro remanendo ab exercitu, ne abeat cum rege*," etc. (Madox, i. 657, 658).

CHAPTER XI.

II. The Development of the Norman Judicial Power.

The judicial system, as the most permanent part of all political organizations, was least affected by change in the transition to the Norman period. Immediately after the first preliminary settlement of affairs, William solemnly bound himself in the fourth year of his reign, "to maintain the good and well-tried laws of Eadward the Confessor," merely excepting certain changes that had become necessary. (Sax. Chron. A.D. 1070.) It is said that he appointed twelve men versed in the law to make a collection of all such laws and customs as were in use in the time of the Saxon Kings. The Saxon population clung to that promise out of affection for their national system of law, and with all the more jealousy, because it afforded a guarantee of personal freedom against the tyranny and violence of the Conqueror and his followers. In all historically authenticated cases it is apparent that William acknowledged the ancient judicial system; that he wished to do justice, and that he perceived therein a means of maintaining and consolidating his new kingdom. From the time of Henry I. that promise is periodically repeated. In the meaning and language of the time, it was understood to embrace the "*lex terræ*," that is, the whole legal system, including criminal as well as civil law, procedure as well as positive law. The promise meant: "Right shall be spoken by the same persons, and for the same persons, and according

to the same forms and principles as in the Anglo-Saxon days." *

Justice is accordingly dealt out by the same persons; that is, the Norman Vicecomes, as Justiciary, steps into the place of the Saxon Shir-gerêfa, and periodically holds the customary courts in the county and hundred. The jurors are, as in the Saxon days, the freeholders of the county.

A decree of Henry I. (Charters, 103) confirms this with a royal reservation. "*Sciatis quod concedo et præcipio, ut a modo comitatus mei et hundredo in illis locis et iisdem terminis sedeant, sicut sederunt in tempore regis Edwardi, et non aliter. Et si amodo exurgat placitum de divisione terrarum, si est inter barones meos dominicos, tractetur placitum in curia mea. Et si est inter vavassores duorum dominorum, tractetur in comitatu. Et hoc duello fiat, nisi in eis remanserit. Et volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerunt in tempore regis Edwardi.*"

The collection of laws known as the Leges Henrici Primi, repeatedly represents the county courts as assemblies similarly composed to those of ancient times. Formerly the Hundred Court was composed of freeholders, but in the County Court the Thanes were the regular judges, and the ordinary freemen only participated as assistant judges, or as mere bystanders. In the place of the Thanes stand now the Crowns and under-vassals and the greater freeholders in their capacity of free landowners. The customary legal system makes them therefore judges: "*Regis judices sunt barones comitatus, qui*

* As to the consecutive history of the Anglo-Norman judicial system, Dugdale's treatise, "Origines Juridiciales," contains only antiquarian matter. Equally perplexing are the scattered remarks in Spelman's "Glossarium." More to the point, but often hazardous, is the sketch in Spence's "Equitable Jurisdiction," vol. i. pp. 99–127. A better treatment of the subject begins with Edward Foss's work, "The Judges of England" (London, 1848–64, 9 vols. 8vo). The merits of the German treatise by Biener, "Das Englische Geschwornen-Gericht," 1852, 1855, 3 vols., and the treatises of Brunner, Gundermann, and others are very great. It is now well established that King Eadward never published a special code of laws, but that by the "*Leges Eduardi*" is meant the customary law of the country at the close of the Anglo-Saxon period. This is proved by the expression of William of Malmesbury (Gest. Reg. ii. 11), "*non quod ille statuerit, sed quod observaverit.*"

liberas in eis terras habent; villani vero vel cocseti, vel qui sunt hujusmodi viles et inopes personæ, non sunt inter judices numerandi" (Hen. I. c. 29).**

The same actions are now heard before the Norman Vicecomes as were formerly heard by the Saxon Eorl and Shirgerêfa: "*omnis causa terminetur in comitatu vel hundredo vel halimoto sacam habentium*" (Hen. I. c. 9, sec. 4). In like manner the regulations touching suit of court, show that the County Court is to be the proper court for the highest as well as the lowest classes: "*Intersint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermanni, præfecti, præpositi, barones, valvasores, tungrevii et cæteri terrarum domini diligenter intendentes*" (Hen. I. c. 7, sec. 2). The duty of the vassals to do suit of court (*secta*) was a feudal duty, and a Saxon custom at the same time; but representation was early recognized: "*si dapifer ejus legitime fuerit; si uterque necessario desit, præpositus, et sacerdos, et quatuor de melioribus villæ adsint pro omnibus, qui nominatim non erunt ad placitum submoniti* (Leges Hen. I. c. I. cit. sec. 7).

The procedure of the tribunals which the Saxon freeholder here sought, was the ancient one, with the Saxon writ of summons, outlawry, security, compurgators, and trial by ordeal. The Norman, on the other hand, preferred a procedure which, furnished with formal pleadings, generally appealed to the duel as *ultima ratio*. The rule of law

** Hence we have at first the old composition of the Hundred Court with its freeholders, the County Court with its Thanes, in whose place now stand hardly more than four hundred Crown vassals and the *subtenentes* of Domesday Book. A limitation to Crown vassals alone, which has been often asserted, is perfectly untenable: no Hundred Court, and not many County Courts, could have been sufficiently composed of the existing number of the *tenentes in capite*. The *subtenentes* of the Domesday Book are only to a small extent invested subvassals, but they were beyond all doubt *libere tenentes*, according to the meaning of the Anglo-Saxon constitution. The degrees in the feudal *régime* came into consideration in the legal system only in one special point, that no under-vassal shall be a judge in a matter touching his feudal lord (Hen. 32, cap. 2), a rule which establishes the principle of the legal equality of Crown and under-vassals as *pares* in the County Court. As a fact in the province of the judicial system a difference between Crown and under-vassals is avoided in the expression used to denote them, which embraces all freeholders alike, "*libere tenentes et qui sequuntur curiam de comitatu in comitatu*," etc. "*Coram baronibus, militibus et omnibus libere tenentibus ejusdem comitatus.*"

which was needed to decide between the two systems had to be determined by royal direction. One chief point, the proof, the Conqueror had already settled according to a *jus æquum* (Carta Will. c. 6; Charters, 84). But this was, after all, only a chief point. Moreover, a trial which took place with judges, lawmen, suitors, and compurgators, each of whom claimed their customary law, whilst no party so much as understood the language of the other, was sure to cause for a long time a terrible confusion, in which partiality and corruption were not wanting. At all events, in this mixed law, we find an arbitrariness on the part of the magistrates both in procedure, proof, and judgment; and a venality that even allowed the ordeal to be avoided by a money payment. With the poor the procedure was somewhat summary.

The law to be applied was, as understood by the Norman and Anglo-Saxon litigants and judges also, heterogeneous. After long fluctuations the necessity for a unity in this respect brought about an arrangement, according to which personal property was generally governed by the Saxon law, real property by the Norman feudal law, whilst the personal family law stood under the influence of the Church. Especially in the law of inheritance did the two systems clash. The Saxon declared an equal right of inheritance in all the sons; Norman custom and the necessities of the knights' fee led to the right of primogeniture. A middle course lay in the maxim: "*Primum patris feodum primogenitus filius habeat; emptiones vero et deinceps acquisitiones suas det cui magis velit*" (Leges Hen. I. c. 70). In the end the Norman law triumphs with regard to landed property; only where numerous old Saxon owners of the soil dwelt close together, as was the case in Kent, an equal division of the land amongst all the sons (gavelkind) remained a local custom. But it is evident that it was no longer the judgment of the *pares*, but only regulations of higher authority (in later times the judgment delivered by the royal justiciaries), that at this period were capable of laying the foundation of the

English "Common law" as a universal law for all classes.***

But together with the retention of the laws of Eadward the manorial courts were also retained, as was taken for granted in the law-books, and emphatically recognized in the "Carta Henrici I." The manorial courts already existing coincided with the customary rights of the Norman feudal lords; though these latter were in some particulars more extensive. In the mixed law which resulted, a feudal idiomatic phraseology prevailed (*e.g.* the term "*curia baronum*"); yet here the state of affairs, partly old and partly new, required to be separated from one another.

1. As a matter of course, the occupier of a manor claimed jurisdiction over his *villani*, a jurisdiction extending over the transfer of property, all disputes arising in consequence, the reservation of services and performances, and disputes of the tenants among themselves. Later legal language calls

*** The question as to the form of the procedure before the Norman *Vicecomes* will always be a most difficult one to solve. (Biener "Engl. Geschwornen Gericht," i. pp. 52–56.) At all events the old tradition that the Conqueror banished the Anglo-Saxon language from the courts is erroneous. The charters of the first Norman kings are issued in the Anglo-Saxon language as being the language of the country, a language which William himself endeavoured to acquire. Latin was employed as an official language only; all official transactions of the Exchequer, all judicial rescripts, all reports of the oldest law suits, all records of the *curia regis* itself, even under Richard I., are couched in the Latin language. It was evidently not the intention of the Conqueror to acknowledge his Norman feudatories as a ruling class, by recognizing their dialect as the language of the country. It was generations later before the French language occasionally appears as the official language of royal ordinances. French was spoken in the courts, but this was a matter of necessity, seeing that the *Vicecomites* and the secular great officers of the realm were for the most part Norman knights. Hence arose the important position of the clerks and under-officials as interpreters and advocates; hence also the early development of a class of inferior attorneys can be explained. A trial carried on in French, with an Anglo-Saxon under-vassal or farmer, would have been quite as difficult in the eleventh century as in the nineteenth. In the country and local courts litigation was probably carried on in a curious jargon, about as confused as the rules of law were themselves. Only in the central courts the technical framing of the procedure, and the appointment of Norman lords as judges, brought about an early ascendency of the French tongue, which again later penetrating from the *curia regis* downwards, formed a French legal language. How the procedure in the Royal High Court became formed under the influence of the clerks of the court and the attorneys at the close of the twelfth century is clearly shown by Glanvill's legal works. (See Phillips' History of English Law, ii. 97–334.)

this old manorial court sitting in civil causes the "customary court," and centuries elapsed before the practice of the courts allowed the peasant class the right to bring an action for recovering their property in the royal courts.

2. The Anglo-Saxon rule, especially under Cnut, had already extended the manorial jurisdiction to the *allodiarii*. The feudal system now introduced the principle that to the mesne lord of the soil belongs also a judicial control over the land of his grantees. In consequence of this, the Norman landlord appears also to have claimed a subjection to his authority of the freeholders who had been attached to the fee of a vassal, rendering contributions, protection moneys, or performances analogous to the under-vassals. The practice of the Exchequer regarded the "right to suit of court and service" on the part of the independent small landowners as naturally included in the grant of the Crown fief. "As soon as a man found himself obliged to do suit and service in the court of his stronger neighbour, it needed but a single step to turn the practice into theory, and to regard him as holding his land in consideration of that suit and service" (Stubbs, i. 189). The private jurisdiction over the *libere tenentes* that thus arose, was now called "*curia baronum*" ("court baron"), and it is apparent from later circumstances that the Norman administration uniformly recognized such an institution, at least for the disputes of the tenants among themselves. The mode of procedure was left to the custom of the individual localities. "*Placita cujusque curiæ secundum consuetudines suas agitantur. Solent autem placita ista in curiis dominorum deduci secundum rationabiles consuetudines ipsarum curiarum, quæ tot et tam variæ ut sunt, in scriptum de facili reduci non possunt*" (Glanvill, xii. 6). The law books, therefore, pass by the procedure of the Court Baron in silence, but teach as an established principle that it exercises a civil jurisdiction analogous to that of the Hundred Court, in real actions as in actions of debt. It was not until later that personal actions became as a rule limited to petty matters not exceeding forty shillings; before bringing a principal action concerning a "*liberum tene-*

mentum" the plaintiff was obliged to sue out of Chancery a "*breve de recto*," acknowledging the judicial authority of the King, and his lordship paramount over all landed property.

3. The manorial courts of later Anglo-Saxon days also exercised a criminal jurisdiction to an unequal and often to a very wide extent. Beyond this, according to the principles of the feudal law, the lord of the fee claimed for the *curia feudalis* a certain criminal jurisdiction over the under-vassals, or at all events a right of distraint on movable goods, for the purpose of maintaining military discipline. Both principles appear blended in the Norman administration, forming a uniform and inferior criminal jurisdiction of the *curia baronum* over under-vassals, *libere tenentes*, and farmers. This criminal jurisdiction, however, is confined to small offences and thefts *in flagranti*. For financial reasons all the heavier cases were reserved to the King, and grants of more extensive rights were, from the Anglo-Saxon period, for the most part restricted.†

† As to the system of the Norman *curiæ baronum*, see Biener, "Geschichte der Geschw. Ger.," i. 48–56. The later jurisprudence distinguished under technical names the various component parts of the Manorial Court. The civil jurisdiction over under-vassals and freeholders in regard to their dependent lands was called Court Baron; the Manorial Court, in its original jurisdiction over those living upon fiefland and domestics, was called Customary Court. The Court leet, finally, was a royal police court over all living upon the land, first instituted by later grant. The Leges Henrici I. employ for the Manorial Court the term "Hallimotum" (Hen. 9, sec. 4; 20, sec. 1; 57, sec. 8; 78, sec. 2), which seems to belong to the more modern feudal language. The most frequent expression is "*saca et soca.*" The Leges Henrici I. cap. 20 contain first of all the general rule: "*Archiepiscopi, episcopi, comites et aliæ potestates, in terris propriæ potestatis suæ, sacam et socam habent, tol et theam et infangentheaf; in cæteris vero per emptionem, vel cambitionem, vel quoquo modo perquisitis socam et sacam habent, in causis omnibus, et hallimotis pertinentibus, super suos et in suo, et aliquando super alterius homines.*" Of course, the King has also the same manorial jurisdiction over his own demesnes: "*omnium terrarum, quas rex in dominio suo habet socam habet; quarundam terrarum maneria dedit, sed socnam sibi retinuit singularem et communem. Nec sequitur socna regis data maneria, sed magis est ex personis*" (c. 19). The later Anglo-Saxon deeds of grant contain the clause: "*concedo ei libertatem plenariam, id est sacam et socam, tol et theam, et infangenethef, monbrich, hemsocne, forstell*" (cf. Cod. Dipl. iv. 167). That the sense of the words was no longer clearly understood was no hindrance to, but rather a good reason for, retaining them as a formula. When the Norman Kings (as Henry I. on his ascending the throne) were obliged to meet their Crown vassals with friendly assurances, the manorial rights formed primarily the subject of these promises: "*Sacam in terra et in aqua, in silvis et in campis, tolnetum et team, grithbrecam et hamsocnam, foresteallum et infangthief, et in fugitivo-*

However well ordered these judicial arrangements might appear externally, their inner life was defective and disordered. The greed and arrogance of the Norman *vicecomites* and vassals made these courts places of arbitrary dealing and oppression. The rules of court and of law to be applied were for many generations contradictory; the judges were kept asunder in various ways by national antipathy. The Conqueror had intended to have the more important customs of each county determined by commissioners; but this work could not be carried out in consequence of practical difficulties. The private codes which were formed at the same time were entirely inadequate for the task. The conflict of the legal conceptions of different nationalities left a wide field open, which the partiality of the Norman country magistrate and bailiff took advantage of for his countrymen and compeers, or for the highest bidder. It is only from the occasional interference of the King, and the partiality of the *vicecomites*, which is mentioned as a matter of course in almost every contemporary narrative, as well as from the general detestation in which the office is held, that we can conjecture what manifold injustice is hidden behind the silence of history. These internal defects bring the Anglo-Norman judicial system into a state of agitation, which by a continuous process of pressure from the lower upon the higher class brings about a centralization of justice, in the following order.

I. **The local courts** become gradually limited. As private rights of the landlord (rights of property) they still exist unabridged, so far as the jurisdiction of the manorial courts over the *villani* extends; that is, as a "customary court." The jurisdiction of the *curia baronum*, on the other hand, is regarded as a personal grant, and can accordingly be refused, "*non sequitur socna regis data maneria, sed magis est ex personis*" (Hen. I. c. 19). For financial and political reasons the royal authority (different from that on the Continent)

rum receptionem super eorum proprios homines intra burgos et extra, tam plene et tam directe, quam mei proprii ministri ipsum exquirere deberent et super tam multos tanorum quot ego eis concessi" (Lye's Saxon Dict., App. Chart. No. 6).

impeded every development of the court baron, and without attacking it in principle, gradually neutralized the judicial power of the mesne lords. Different circumstances tended to this result.

(*a*) The scattered position of the lords' possessions rendered it an exceedingly difficult matter to form great feudal manors in consequence of the great distances (Hen. I. c. 55). The principal seat of the lord, the "*caput baroniæ*," might well be a place of meeting of the under-vassals for festivities, investitures, and the like, but could be no baronial court for the collective vassals, no "*cour de baronie*" in the French sense. A court baron of this description was more important, as numerous under-vassals and the personal presidency of the lord could be added to the ordinary freeholders. But the judicial power of the great feudal lord, as far as can be proved by documents, was only an aggregate of manorial jurisdictions, not different in quality from the jurisdiction of a manor.††

(*b*) To this was added the superintending and rival power of the King as the highest judge in the land, which in the spirit of Norman administration was zealously exercised on account of the perquisites. The Exchequer records show that

†† The owners of the greater lordships, surrounded by the officials of their households, held solemn feudal courts (Madox, i. 101), and in their documents made use of a style analogous to that of the royal administration of justice: such expressions as "*Dapifero meo et omnibus baronibus meis et hominibus meis Francis et Anglis*," are frequently to be found in the "*Monasticum Anglicanum*," and in the "*Formulare Anglicanum*." But the scattered position of their lands did not permit in practice of any other relation than that of intermediate Crown vassals. The under-vassals could not come from distances of twenty or a hundred miles to their feudal courts, in order to hold sittings once a month, after the fashion of a hundred court. With the *caput baroniæ* the jurisdiction of several contiguous manors was often united (Heywood, 148); but it never went beyond the scale of a plurality of manors. "Although an honor consists of many manors, and there is for all the manors one court only held, yet are there quasi several and distinct courts for several manors" (Scroggs, 81, 82, cited by Scriven on Copyholds, 6). Regarding the defective nature of the manorial means of execution, see Scriven, vol. ii. 757. As to the lending of lawmen, which in later times no longer occurs, see Ellis, i. 236, 237. By the statute, *Quia Emptores*, 18 Edw. I., the development is legally curtailed. In the rare cases, in which in later times the King makes an hereditary grant of the administration of a hundred, this is done with reservation of the jurisdiction of the Royal Judges and Sheriffs. A request of the landlords to have their own prisons was refused by the Statute of Merton: "*Magnates petierunt propriam prisonam de illis, quos caperent in parcis et vivariis suis. Quod quidem dominus rex contradixit, et ideo differtur.*"

judicial mandates proceeding from the royal court very early admonished the feudal courts to administer justice under the threat that in default the supreme power would intervene. The "writs of right" directed to the small patrimonial courts were openly issued, as letters patent, and were despatched by the Vicecomes. They contained the regular clause, "*et nisi feceris, vicecomes hoc faciat, ne amplius clamorem audiamus pro defectu recti.*" Every defect in this customary judicature was made use of for the same purpose. The right of distress which belonged to the mesne lord is only a sequestration without the right of sale. In cases of execution the King must accordingly be appealed to, and the matter given over by writ to the sheriff to be further dealt with. Every complaint, that the manorial court refuses justice or does not properly administer it, transfers civil as well as criminal matters to the Royal Court; in like manner appeals by "writs of false judgment." Where the manorial court has not been properly composed (which often occurred, owing to the scattered position of the estates), the matter at once devolved upon the Royal Court. All attempts made to form a superior jurisdiction of the greater feudal courts over the sentences passed by a smaller curia, are finally cut short by the Statute of Marlebridge in the rule, "*Nullus de cætero (excepto domino regio) teneat placitum in curia sua de falso judicio facto in curia tenentium suorum; quia hujusmodi placita specialiter spectant ad coronam et dignitatem domini regis.*"

(*c*) Decisive reasons were also contained in the nature of the law that was to be applied. After the lapse of a century, the administration of justice had become concentrated in a class of professional judges. Compared with this arrangement the formation of the private courts became more and more insufficient. In like manner the mode of taking evidence, especially the procedure with compurgators, "*legis vadiatio*," became less and less practicable. Whilst in the royal tribunals a reform adapted to the times was introduced, which developed a civil jury, and somewhat later a criminal jury, they were still denied to the private courts, the insignificance

of which rendered such reforms for the most part inapplicable. The fact that the private courts remained upon their old basis, whilst an untiring legislation brought the Royal Courts important improvements, also contributed to the unavoidable decay of the former.

(*d*) When in course of time great lordships reverted to the Crown in consequence of escheat or forfeiture, these extensive judicial powers were in the re-grants frequently withheld; and generally the sub-vassals were made immediate vassals of the King. By this means, and also owing to the ultimate interdiction of subinfeudation, the courts baron lost their best lawmen. It was next assumed that where there did not remain at least two freeholders to compose the court, their jurisdiction was suspended. All these defects are seized upon by the higher courts, and private jurisdiction becomes merged of the county and royal courts of first instance.†††

II. **The County Courts**, as regular country courts of the *liberi homines* of the realm, passed over unchanged, with their two grades of Hundred-gemôte and Shire-gemôte, into the Norman period. In their case also a curtailment of competence took place.

1. The Hundred Court appears with its monthly sittings in the Leges Hen. I. c. 51, sec. 2, "*Debent autem ad singulos menses, i.e. per annum duodecies, congregari hundreta.*" In like manner c. 7, sec. 4: "*Debent autem hundreta vel wapentagia duodecies in anno congregari, et sex diebus ante summoniri.*" In Henry I. 41, sec. 6, it is repeated that a *hlâford* shall

††† As a counterpoise to the great feudal lords, the opposite maxim was followed in favour of the towns. London and certain larger towns obtained by privilege a mayor, or a town-reeve, who apparently exercised the whole criminal and civil jurisdiction of the Vicecomes, and entirely superseded him. Other towns also, in order to lighten their judicial duties, began to show a constant tendency to form a special court of their own, which was desirable for the wants of a more closely packed population. Such grants were now made by the king, as lord-paramount, by charter, according as the necessity of the case required, or on petition, and on the payment of high dues. In the bishops' sees the grants are generally old; in abbey lands they took place regularly. In certain charters of Henry II., a complete exemption from all interference of the *Vicecomes* is pronounced, and consequent immunity from the suit of court in the county. Under John grants were made in great numbers, which, in the order of things existing in those days, created, at all events, a special "court leet."

present his accused man at the hundred. But beyond doubt the hundred court suffered considerable damage from the fact that the court baron became extended with the competence of a hundred court to under-vassals and *libere tenentes*. The hundreds appear almost everywhere broken in upon by manorial courts; and, owing to the dissensions prevailing among the lawmen, give the feeblest possible guarantee to the weaker against the stronger. It is scarcely conceivable how, at this time, considering the number of the hundred courts, an adequate composition of them was possible; but it is very easy to understand that the *Vicecomes*, overburdened with business, had little inclination to hear, twelve times a year in each hundred, small civil causes which brought in only small fees. From the supplementary relations, which always subsisted between county court and hundred court, it followed that numerous civil actions were brought into the county court. That the hundred court was, notwithstanding its apparently small judicial activity, regarded as a regular district court, is explained by the tenacious adherence of the people to a judicial system, which was the last buttress of the social conditions of the ordinary free man. The character of lawmen in the hundred court remains the legal mark of the *liberi et legales homines*, who keep their position by the side of the class of knights, and who furnished the most numerous members for the later important trials by jury.

2. The County Court, now "*Curia comitatus*," has, from old custom, jurisdiction in more important cases, over actions brought against Thanes (now "*milites*"), and other influential persons. Already in the Anglo-Saxon period its relation to the hundred court was a supplementary one. From the sphere of the hundred courts and courts baron, a number of civil causes are now brought thither. Of criminal offences, we find mention most frequently made of thefts and smaller offences (*metletæ, verbera, plagæ, transgressiones*). The accumulation of business brought it about that later (as decreed in Magna Charta) twelve sittings were held annually. Even the Leges Henrici 51, sec. 2, say, "*Comitatus bis, si non sit opus*

amplius, congregari." It appears, therefore, that in addition to the two legal Shire-gemôtes, prorogued sittings were introduced, to which, as instituted court sittings or "county courts," only the interested parties were summoned. But even thus the county court was inadequate to settle the great number of small criminal cases. Hence from the county court a "*turnus Vicecomitis*," "Sheriff's Tourn," was separated off—a new institution, belonging to this period, according to which the *Vicecomes* journeys, at least twice a year, through the several hundreds, and, in the capacity of Royal Commissioner, disposes of the petty misdemeanours, which were most practically dealt with at the places where they were committed. This *turnus Vicecomitis* is not to be regarded as an original institution of the hundred, but as a branch of the county court, by virtue of royal commission; which is referred to by Henry I. c. 8, sec. 1: "*Speciali tamen plenitudine si opus est, bis in anno conveniant in hundretum suum quicunque liberi, tam hudefest, quam folgarii, ad dinoscendum scilicèt, si decaniæ plenæ sint, etc.*" Similar delegations to a commissioner were to be found in Normandy. On these circuits the whole male population of the small districts appeared for police purposes, whence it followed that the name of people's court, "court leet," was customarily applied to these court-assemblies *per delegationem*. Under the Norman fine and fee system there arose from them a local police-court (cap. 12), which was further a subject of grants to landowners and parishes. From the position of the *Vicecomes* as royal commissioner, it can be seen why the Tourn is regarded as a royal court of record, whilst the old Anglo-Saxon county court is not one. In the multifarious business thus brought before them, the *Vicecomites* make use of their higher bailiffs as substitutes; the lower bailiffs are employed for summonses, executions, and service at court sittings. (2)

(2) The county and hundred courts have of all Anglo-Saxon institutions preserved most faithfully their original form, and we find that the Leges Henrici, cc. 7, 8, 14, 41, 91, and a number of other passages, describe the county and hundred courts purely in the form in which the Normans found them. Now that the sheriff, according to the new arrangement, must twice a year

Numerous and important as the county causes now became, a diminution of their competence is very soon visible, owing to the royal reservation of actions touching Crown fees, and of the heavier criminal cases, of the extent of which we shall have to speak later on. In the county court also is seen a tendency to go higher; the reason for which must be sought in the partiality of the sheriff, and, still more, in the state of the law and judicial decisions. The duties of members of the village communities to act as judges (in Germany styled *Schöffen-Verfassung*) cease everywhere when compound modes of property and social conditions take the place of simple and uniform tenures. In Anglo-Norman England, the law of possession had from the first to develop itself out of discordant elements, by applying the Norman feudal law to Saxon modes of tenure. In like manner a unity of legal views on the part of the judges was prejudiced by contrasts of nationality, and gradually, too, by those of the modes of tenure, in proportion as provincial, civic, and ecclesiastical legal spheres came into daily collision. The diversities of interests and views of social life, as it became settled, effaced the sense of legal unity, and made it necessary that the development of law should proceed from State authority. Decisions had here, at an early period, to be gathered from interpretations and analogies; for a customary law based upon the "legal customs of the community" would have been a different one in almost every county, hundred, and town, according as nationalities were confused and knights, freeholders, and citizens were blended together. In a still greater measure was this true of criminal law and criminal procedure, in which, for the maintenance of the public peace, the most important principles had to be modified by the higher authorities.

III. From this internal process of decomposition can now be explained the position of the royal jurisdiction under the

hold a police-court (*turnus Vicecomitis*), we meet (as early, indeed, as the Leges Henrici I.) with two sorts of courts in the hundred—the great court for the Frank-pledge, the Sheriff's Tourn, held twice a year; and the smaller court, the *curia parva hundredi*, held every three weeks, presided over by the bailiff of the hundred, for the decision of petty civil cases.

Norman name of "curia Regis." Probably at the time when the Anglo-Saxon judicial system was confirmed, many reservations demanded by the feudal system were made. Of civil matters, legal disputes as to Crown fiefs were reserved to the King, for his personal instruction of the court; as were likewise differences as to *advocatiæ*, and the like, out of regard to the state of ecclesiastical relations. The ancient judicial authority of the King could also summon before him every action from the lower courts, partly on account of *defectus recti*, and partly when it was assumed that in the lower court impartial justice was not to be obtained.

It was not intended by this, that for all such cases a special court of lawyers should be formed at the royal court. The majority of such cases were referred by commission to the county court or some neighbouring county court, as extraordinary matters, not lying within the *firma* of the *Vicecomes*. Only in case of actions against the greatest magnates, the King sometimes appointed a commission of prelates and vassals of the Crown, to decide the matter at court. The composition of the county courts, which excited little confidence, and the want of unity in the principles of law, as applied to rights of property, promoted an appeal to the royal fountain of justice; especially from the time when special commissioner-judges (*justiciarii*), who were free from the animosities and eagerness for fees of the sheriff, began to be appointed for this purpose. So soon as the way was thrown open, under Henry II., a flood of civil causes immediately swept into the royal court, which was now opened on payment of fees, to the most varied legal claims. The condition of things resulting herefrom is shown in the treatise of Glanvill, i. c. iii., where a considerable list of reserved civil causes appears, with the further addition "*quodlibet placitum de libero tenemento vel feodo potest rex trahere in curiam suam, quando vult*" (cap. v.).*

* The jurisdiction of the *curia regis* will be discussed at greater length in connection with the central administration (caps. 16, 17). The royal reservation of civil causes was probably originally limited to the provision in the Carta Henrici I., touching litigation as to Crown fees. Glanvill, i. 3,

The course of criminal justice is analogous. Here also at first a reservation was made of certain more serious offences, such being in Cnut's laws reserved to the Crown from the jurisdiction of the private courts (Hen. I. 10). The mass of the reserved cases was, however, at first assigned to the county court for hearing. Only in cases of the prosecution of prelates and the highest vassals of the Crown, and even then only in a few cases, which are recorded in history, did the King make use of his privilege of administering supreme criminal justice through a commission of prelates and vassals of the Crown duly appointed; and this criminal authority generally commuted capital sentences into confiscations and forfeiture of fiefs. But in this respect the royal reservation increases, and even Glanvill reckons all "*feloniæ contra pacem regis*" among the Crown cases reserved: even frays and brawls, if they are tumultuous in their character, "*si accusator adjiciat de pace regis infracta*" (Glanvill, i. cap. 2). The heavy criminal offences appear now as "*feloniæ contra pacem domini regis*," and in regard to the mode of proceeding as "*placita coronæ.*" A better spirit is infused into this portion of the legal administration by the severance of the farm interest (*firma*) from the judicial functions; which was effected by the appointment of royal *justiciarii* in the place of the *Vicecomes.* The reservation of the royal right of interference now develops into a periodical delegation of matters to criminal judges.**

reckons as reserved cases: "*placitum de baroniis, pl. de advocationibus, questio status, pl. de dotibus unde nihil, querela de fine facto, de homagiis faciendis, de releviis recipiendis, de purpresturis, pl. debitis laicorum.*" Certainly, a more extended meaning is afterwards given by Glanvill's words (i. 5): "*quodlibet placitum de libero tenemento vel feodo potest rex trahere in curiam suam, quando vult.*" From the time of Henry II. begin the numerous cases of payments for the acceptance of the cause at the royal court under the heading "*ne placitet nisi coram Rege de tenementis suis; ne ponatur in placitum nisi coram Rege vel ejus capitali Justiciario*" (Madox, i. 19 *et seq.*).

** The original reservation in criminal matters is summed up as follows in the Leges Henrici, i. c. 10, "*Hæc sunt jura, quæ rex Angliæ solus et super omnes homines habet in terra sua: infractio pacis regiæ per manum vel breve datæ; danegildum; placitum brevium vel præceptorum ejus contemptorum; de famulis suis ubicunque occisis vel injuriatis; infidelitas et prodicio; quicunque despectus vel maliloquium de eo; utlagaria; furtum morte impunitum; murdrum; falsaria monetæ meæ; incendium; hamsocna;*

The reign of Henry II. is a period of transition, which in its centralizing spirit brings the more important matters through travelling judges to the court (*curia*), and which also by forming a body of professional judges prepares the way for a more solid system of justice in the whole realm according to the principle of unity. The system of royal *justiciarii* about the middle of this epoch forms such a connected whole, that a special exposition of the central administration is needed (cap. 17). The transition to the administration of justice by official and professional judges, which did not take place in Germany until centuries later by the adoption of foreign law, was accomplished here as early as the twelfth century. Considering the tenaciousness with which the Saxon population clung to their customary law, this would have been almost inconceivable, if it had not been necessitated by the bad state of the county courts. But it also goes hand in hand with an entire transformation in the old participation of the lawmen in judging, which change, as early as Henry II., already begins to assume the outlines of a civil jury, and under Henry III. that of a criminal jury.

The great change which here occurs depends chiefly upon royal ordinances, even upon quite informal instructions. Only in the case of a few decisive innovations did Henry II. find a conference with assemblies of notables by means of the so-called "Assizes" advisable. Most new arrangements proceeded from necessity, and were begged for by the litigants at court as a boon, and were moreover of such a technical kind, that the improved administration of justice could only evolve itself slowly and irregularly out of the practice and better

forestel," etc. This passage is in part a translation of the Leges Cnuti, II. 12–15, and it is doubtful how old the confusedly added clauses may be. At the close the author, however, adds: "The meaning of this reservation is, that the hearing of these more serious criminal cases does not belong to the general farming of jurisdiction: '*Hæc sunt Dominica placita Regis nec pertinent Vicecomitibus vel Apparitoribus vel Ministris ejus sine definitis prælocutionibus in firma sua.*'" It accordingly did not exclude the power of assigning all these cases to the commissioners to deal with before the county court, which was very frequently done until Magna Charta. The assertion in Glanvill, i. 2, is more reliable, but it furnishes no proof of the exact time of extension.

spirit of the magisterial body. Though according to the State records as yet published, much still remains defective, the following may be taken as the situation at the close of the period.

The judicature had been reformed by ordinances of the King; his administrative power had to a considerable extent remodelled law, judicature, and procedure. The arrangement of the court had been transferred in all important civil and criminal matters to the person of the Sovereign; "*in curia domini regis ipse in propria persona jura decernit*" (Dial., i. cap. 4).

The judicial decision in these cases rests no longer with the lawmen of the county, but with *justiciarii* appointed by the King, for the most part officials educated in the law, to whom, as immediate organs of the royal administration of justice, the county courts, as inferior courts, are subordinate.

The ancient participation of the people in the administration of justice is limited to what in this altered order of things the members of the community still were, and to what they could perform; that is to say, to the determination of the *quæstio facti* by commission appointed for this purpose, in the form of a civil and criminal jury. The customary manner of *inquisitio* by means of sworn committees of the community, which was in use at the time of the framing of Domesday Book, for the purpose of deciding on the royal privileges, the levying of taxes, determining the degrees of military service according to the assize of arms, and for the actual settlement of local affairs, is now made use of to substitute a more rational mode of proof for the obsolete modes of taking evidence by means of compurgators, ordeals, and duels.***

*** The development of the jury in civil actions has been fully discussed and determined in all its technical details in the great treatises of Biener, Brunner, Forsyth, and others, so that it suffices to notice the results. The connection of these technical institutions of procedure with the political organization, is important for constitutional history. Where an energetic central government, like that of Charlemagne, or of the Norman kings, with its defective official system, needs an exact local certification, it is by the nature of things referred to the testimony of the *villa*, the *hundredum*, and the *comitatus*. This testimony can only be practically delivered by a representation of those bodies, that is, by a provost and four men for the

At the close of this period we find the civil and criminal procedure based upon a systematic co-operation of the Royal Judges with committees of the community; and already in Bracton's treatise the more modern fundamental principle of the judicature is laid down in its universality "*Veritas in juratore, justitia et judicium in judice*" (Bracton, fol. 186 b.). The legal decisions which are now pre-eminently the application of general laws, pass from the community to the official professional judges. But the former participation of the community, consisting in passing sentence, compurgating and giving evidence, is reduced to the determination of the "question of fact" by committees selected out of the body of the hundred.

It is evident that thus the judiciary powers of the King have become something different from the formal and merely supplementary judicial office of the Anglo-Saxon sovereign. The King has become the "fountain of justice" in a new acceptation of the term, a royal supreme judge in the most extensive sense, and in sense until then unknown to the Middle Ages.

villata by the *duodecim legales homines* for the hundred, and by the twelve or more *milites*, etc., for the *comitatus*. For the greater bodies, those of the *hundredum* and the English "burghs" the number of twelve was fixed already in the Anglo-Saxon period as the proper representation. This combination of an action of the government with an action of the local bodies was made so necessary by the circumstances of the case, that the Church with its synodal courts, and Charlemagne with his attempts of secular presentments and *recognitiones* were obliged to take the same course. The material part of the innovation consisted, as Brunner remarked with perfect truth, in the fact that the magisterial power of itself, by virtue of its office, helps to the furnishing of evidence, whilst in the ancient *legis actiones* the proof was purely the concern of the parties. So soon as the principle of an official determination of evidence (*inquisitio*) had for once and all become established, the modes of taking such evidence depended upon the constitution of the offices, and the official districts. In this sense a modified introduction of the Frankish institutions which had long been in vogue in Normandy took place, and these were now adapted to the English *comitatus*, *hundreda*, and *villatæ*, and technically developed by the jurists of the *curia regis*. The action of the jury in criminal affairs is dealt with on p. 189.

CHAPTER XII.

III. The Development of the Norman Police Control.

As the Anglo-Saxon sovereign, in his capacity of supreme guardian of the peace, proclaimed the "King's peace" at his accession, so did also the Norman kings. This proclamation (at all events from the time of Henry II.) was regarded as valid for the whole of the reign; occasions, however, often presented themselves for general and special proclamations of peace. In the oldest Treasury records we find fines of five marks, eleven marks, and £20, "*pro pace fracta*," especially recorded against Norman lords. The oldest regulations on this point are only repetitions of existing arrangements; but in the hands of the Norman sovereigns they continually attain greater dimensions.*

* That the Norman national police regulations are a continuation of the Anglo-Saxon system of maintenance of the peace is shown by the detailed references of Palgrave, ii. 105 *et seq.* The difference between the "*Pax data manu regis*," and the "*pax a Vicecomite data*," is put forward in Henry 79, secs. 3, 4; the equal value of all immediate and mediate peace-proclamations in Edw. 12, secs. 1, 27; as to its reaction upon private feuds, see Bracton, i. 2. c. 35, sec. 5; Fleta, i. 3. c. 16, sec. 16; Britton, 68; and Allen, "Prerogative," 121. Its connection with the Anglo-Saxon police security, in consequence of the confused statements of the Leges Eduardi c. 20, has provoked much controversy. (See the detailed account in Waitz, "Deut. Verf. Gesch.," 2nd edit., 1865, p. 426–457.) The author of that private collection does not here quote the words of the law, but only gives descriptions, in which he endeavours to elucidate to his contemporaries the ancient police system of the country. The word "Frithborg" (according to Lambard "Freoborg") which there occurs, probably belongs more to the popular language than to the laws. "*Francplegium*" is the Norman translation in the official vernacular of the times. The changes during the Norman period probably consist merely in the altered method in which the Exchequer, and

I. The Anglo-Saxon principle of police sureties is repeated in the ordinance of William I. c. 8 (Charters, 84): "*omnis homo qui voluerit se teneri pro libero sit in plegio, ut plegius eum habeat ad justiciam, si quid offenderit. Et (si) quisquam evaserit talium, videant plegii, ut solvant quod calumpniatum est, et purgent se, quia in evaso nullam fraudem noverint. Requiratur hundredus et comitatus, sicut antecessores statuerunt.*" In like manner the responsibility of the Thane for his dependants is found in the Leges Eduardi, c. 21; that the vassals of the Crown should have their *milites* and *servientes* under their security, and these again their "*armigeros vel alios servientes.*" To establish an effectual control, the Norman administration now introduced an annual revision of the police unions, the "*visus francplegii,*" view of francpledge. This revision was combined with the circuit of the *Vicecomes* at Michaelmas, and lasted for centuries, and in name even down to the present day: "*Bis in anno conveniant in hundretum suum quicunque liberi, tam hudefest quam folgarii, ad dinoscendum, si decaniæ plenæ sint, vel qui, quomodo, qua ratione, recesserint vel super accreverint*" (Hen. I. c. 7). In these laws only general surety, a responsible pledge, or two pledges are primarily spoken of. But the Norman financial administration has in this as in other cases introduced a more rigorous mode of exaction. The Norman official, who had nothing in common with the communities, summarily demanded the fine from the people *tributim* (in gross), and left them to settle the matter among themselves. The result was that in this manner the system of police sureties developed into a mutual responsibility of the tithing, and it can thus be explained how in the twelfth century the private compiler of the Leges Eduardi considers the police suretyship as a mutual one; "*ita quod si unus ex decem forisfacit, ad rectitudinem novem haberent decimum*" (Edw. c. 20, sec. 1), yet in such a way, that the guilty perpetrator, if discovered, himself pays the indemnity (sec. 2). If he escapes,

the royal magistrates with increased military and police powers, exact the fines in the most summary fashion from the "obstinate and ill-disposed" communities.

and has no property, the provost of the tithing must make compensation "*de suo et frithborgi*" (sec. 4). Following these passages, scholars have erroneously invented a system of "mutual-surety" which they allege to have existed in the Anglo-Saxon period. The later law books also mention it as being a duty incumbent on the community; *e.g.* Bracton, 124: "*De eo autem qui fugam ceperit, diligenter inquirendum, si fuerit in francplegio et decenna, tunc erit decenna in misericordia coram justiciariis nostris, quia non habent ipsum malefactorem ad rectum*" (see Fleta, i. 27, sec. 4). Certainly the Anglo-Saxon law of settlement, the necessity of every vagrant being received into a parochial union, could be most effectually enforced by this system of exacting penalty from the community in gross; and thus it remained for centuries an instrument for harshly treating vagrants and suspected persons. (1)

II. This rigorous treatment of the tithing was followed by an extension of the responsibility of the larger union of the hundred. The insecurity of the Normans in the midst of an exasperated population was the cause of the issue of a decree by William, that any hundred should at once pay forty-six marks, within whose boundary a Norman should be found murdered, unless the perpetrator were captured within five days. (Will. I. 3; Charters, p. 34.) Here again the royal right to issue ordinances is conspicuously seen. A Saxon Witenagemôte would most certainly have claimed the right of

(1) That from the first a transfer of Anglo-Saxon institutions was intended, is also shown by the Exchequer accounts. In numberless cases, districts were fined for "harbouring an unknown person without having taken *francplegium* of him," and for "harbouring a man who was not in the *francplegium*," for receiving a man "without Tething," and so on. (Madox, i. 546 *et seq.* 555.) See in Gervase (i. 565), where the hundred of Peckham and others are fined, because they wittingly allow a man to live amongst them without "*francplegium*." The yearly recurring view of frankpledge was an efficacious measure, but one which was not exactly essential to the system, and in many districts was not put into force at all. The later exercise of it is shown in Magna Charta; in Fleta, ii. 52, 72; Britton, c. 29; Horne's "Mirror," c. 1, sec. 16. The institution was not introduced in those provinces lying north of the Trent (Palgrave, ii. 123), which fact seems to prove that it proceeded from the Conqueror himself, at a time when these northern provinces had not yet become included in the Norman government.

agreeing to such innovations. But now the threatened Norman community eagerly accepted an effectual protective measure which the other party was not in a position to gainsay. But soon the administration extended the principle still further, so that, according to the Exchequer accounts, a fine is charged upon the hundreds "in gross," as a subsidiary responsibility, where the village does not possess the means of paying the police fines it has incurred. (2)

III. A step further and a duty of presentment was developed out of these beginnings. The necessity of not leaving the prosecution of breaches of the peace purely to the pleasure of the injured party, but of prosecuting them *ex officio* in the interest of the injured commonwealth (the King), had even in the Anglo-Saxon period led to a decree of Æthelred III. (3, sec. 3); which speaks of a presentment of breaches of the peace "by twelve Thanes of the hundred." This decree apparently remained isolated and was soon forgotten. But the Norman *Vicecomes*, wherever he was confronted by the Anglo-Saxon population, was from the first ordered to settle local matters by the help of neighbours sworn in for this purpose. The exact time at which a procedure of this kind became established for police purposes, and whether it was connected or not with Anglo-Saxon institutions, cannot be

(2) The extension of the police responsibility to the hundreds in the case of *murdrum* rests upon a direct ordinance of the Conqueror. (Will. I. c. 2; Charters. 84.) The innovation consists in the principle of the responsibility of all the men of the hundred, separately and collectively, as well as in the enormously high penalty of forty-six marks in silver. In practice this was rendered all the more severe by the legal presumption, that every unknown corpse is to be considered as that of a Norman, until proof given that the murdered man is an Englishman. The author of the Leges Eduardi, in cap. 15, represents the case, as if according to Anglo-Saxon regulations the forty-six marks were to be primarily collected in the guilty *villa*, and according to the newer regulation the sum was to be gathered from the hundred, to obviate the ruin of the small communities. The Carta Wilhelmi itself speaks of the lord of the manorial court being primarily answerable, the hundred making up the deficiency in the sum, "*ubi vero substantia domino deficerit, totus hundredus in quo occisio facta est communiter soluat quod remanet.*" From these ordinances and the more ancient usages, there arose in practice a subsidiary liability of the hundred for other police penalties also. (See, as to the frequent penalties inflicted on the hundreds, Madox, i. 565, and the whole section on the subject of amerciaments.) The county of Shropshire was exempted from this system, as were also favoured cities like Worcester and Bristol.

determined. But when the stormy times had passed by, and the delegation of travelling commissioners from the court (*justiciarii*) had become a standing institution under Henry II., the chief organs of the State were ready and able in conjunction with the *Vicecomites* to carry out and maintain such a presentment. Traces of this institution are first found in the Assize of Clarendon, A.D. 1166. The "*capitula placitorum coronæ*" of the years 1194 and 1198 (Statutes of the Realm, i. 33 *et seq.*) mention as an already established practice that the travelling judges were furnished with forms of questions, by which they had to examine the communities as to punishable offences and the infringement of the royal prerogative. On the Hundred Court days of the sheriff, this was naturally united with the view of frankpledge and the other criminal and police business of the *Vicecomes*. As in the Assize of Clarendon, so again do we find the "*inquisitiones coram Vicecomitibus*" specially mentioned in the statute of Marlebridge (1267), c. 25; in the stat. Westminster i. c. 11, 15; stat. Westminster ii. (1285) c. 13, according to which the under-bailiffs of the exempted districts are to adopt the same procedure. About the middle of the thirteenth century the legal work of Bracton gives us a picture of a perfectly developed system of presentment; and still more in detail, Fleta, i. c. 19, 20, ii. 52; Britton, c. 2–21, 29; the Mirror and the Statutum Walliæ (1284). The travelling judges find the representatives of the hundreds all assembled. By a preceding proclamation, they proceed to form a presenting jury in such a way that, out of every hundred, four knights are appointed, who, as elective officers, appoint twelve *milites* or *liberos et legales homines*. At the commencement of the proceedings the free townships and districts are bound, through the medium of their *præpositi*, in accordance with the instructions contained in certain forms of inquisition, to present the offences that have occurred in the interim. The twelve jurors then deliver their verdict on this *indictatio*, and further as to whether anything has been withheld. The formulæ of inquiry—which included what

the jurors thus appointed knew of crimes that had been committed, and their probable perpetrators, of infringements of royal rights, of official misconduct, and extortion on the part of provincial magistrates and under-magistrates, and of offences against the police laws affecting weights and measures, bread, beer, and wine—contained, with later additions, as many as a hundred and thirty-eight questions. The twelve jurors of the hundred are sworn in with the following formula: "*quod veritatem dicam de hoc quod a me interrogabitis ex parte domini regis.*" The answer given by the twelve jurors is regarded as an official indictment or presentment, and can at once come on for trial. Until the close of the Middle Ages we find travelling judges, sheriffs, and local courts, all exhibiting an inquisitorial activity which, through the formulated instructions, develops itself uniformly. The whole male population is accordingly assembled at short intervals, not now in order to find a sentence as lawmen, but in order to give account of the way in which peace and order has been preserved, to take the oath of allegiance when required, or to renew the same, or, finally, to present themselves for a formal police inspection. This system of official indictment led further to a change in the mode of evidence; since, as against the official indictment, compurgators and duels were out of the question, and seeing that the ordeal, in consequence of the decrees of the ecclesiastical councils, had fallen into disuse after the year 1219. A new procedure is thus introduced into the practice of the courts; according to which the defendant is asked whether he is willing (in the place of the ordeal or duel) to submit to the decision of his community (*patria*). If he submits, the definite question is laid before the jury, "*an culpabilis sit, vel non.*" Originally this might be the same presenting jury which had pronounced the *indictatio*, but the defendant was allowed a right of challenging individual jurors, by which means a new jury was formed. In the following period this becomes the legal rule; the defendant can always demand the empanelling of a new jury, which now, as a petty jury,

definitely delivers its verdict of "guilty," or "not guilty." As the indictment jury proceeds from the decrees of Henry II., so also from the practice of the courts under Henry III. was the verdict by "*jurata*" developed. (3)

IV. The keystone of this police-system was the transformation of the *turnus Vicecomitis* into an office for examination and police-court, and the origin of the courts leet, co-ordinated therewith. Owing to the circuits of the judges, and the increasing centralization of the criminal trials, the county courts became lower courts for criminal cases, with which the newly formed system of presentments could be

(3) The development of the presentment duty of the hundreds and parishes is, as a rule, referred to Æthlr. III. 3, which treats of a presentment pronounced by the twelve Thanes in the hundred, but which was not long retained in this shape, and which perhaps never was carried out at all. This can be explained in the same way as on the Continent, in the post-Carlovingian period. As a constant and firm direction of the procedure by royal officers was wanting, the new institution decayed; and continued (as on the Continent) only in a crumbling form, as a presentment in smaller communities; and of this we find traces as in Cnut. II. c. 30. "And if a man of the hundred is so faithless, and is so often accused, and three men together accuse him, there remains nothing for him but to go through the threefold ordeal" (see Leges Will. c. 51). The Norman system of presentment that was now being received arose from the new administrative system, which with its Norman officials standing face to face with a foreign and hostile population, was obliged from the first to have local statistics verified by persons appointed and sworn in for the purpose. It is a disputable point whether the *inquisitio* of the *Vicecomites* or that of the justiciaries was the earlier. But this new institution only became permanently effective after there had been found in the royal justiciaries in their capacity of emissaries, the instruments for conducting such a system of presentment. The connection of the "petty jury" with this system, after the abolition of the ordeal, is shown in the voluminous literature on the origin of trial by jury; before all by H. Brunner, Biener, and Forsyth. The necessity of putting the question to the *indictatus*, whether he was willing to subject himself to the judgment of his community (*patria*), is undoubtedly due to the fact that the new procedure could not be called a "*judicium parium secundum legem terræ*." According to the one opinion which is repeatedly expressed by Bracton, an obligation to do so took the place of the former obligation to submit to the ordeal. Here, as there, a "*tenetur*," "*compellitur*," "*cogendus est*" was inferred, by virtue of which the refusing party "*indefensus et per hoc quasi convictus remanebit*." Accordingly the full penalty was imposed *in contumaciam* upon the person refusing. But the matter was still doubtful. The new procedure was no *judicium*, as was assured shortly after Magna Charta. Only where the accused gave his express sanction to the proceedings, did a deviation from the customary mode of proof appear unobjectionable. But to obtain this acquiescence coercive measures were considered right, a "*prison fort et dure*," yet without bloodshed and bodily injury, in order to adhere strictly to the letter of Magna Charta. In the year 1275 this was approved, and the new procedure generally directly sanctioned by the statute Westminster i. c. 12.

practically combined. From the thirteenth century onwards the *turnus Vicecomitis* appears a very effectual mode of bringing to the higher tribunals the official indictments of the hundred for serious criminal offences. At the same time the *turnus* remains a criminal court for petty offences, the number of which increases with each generation, in consequence of later ordinances, especially of those touching weights and measures, bread, beer, and wine. The summons of the hundreds for the discharge of such unpopular business, and the extortion inseparable from the office of sheriff, render the tourn a periodic public grievance. The sheriffs and their bailiffs, who were often changed at short intervals, often failed to bring with them the local knowledge necessary for such work. Hence, among thickly populated districts, a tendency became manifested to form for themselves a separate jurisdiction for these summonses of the whole male population (which now were pre-eminently called popular courts, "courts leet"), and by taking this burdensome business upon themselves, to be at least quit of the extortionate magistrate. Through royal concession the bishoprics and abbeys were the first to succeed in doing this. In return for considerable money payments it was from the time of King John granted to numerous burghs. But it was also the interest of smaller hamlets and manors to form their own court districts, in which a manorial magistrate was now felt less oppressive and was less hated than the extortionate *Vicecomes* and his underbailiffs. The lord of the manor had the same interest, and was quite as much inclined to exchange the old limited criminal jurisdiction of the court baron, which had become odious to him, owing to the continual interference of the *Vicecomes* and the ever-recurring penalties for alleged transgressions, for a royal concession, which granted him a police jurisdiction to the extent of the sheriff's-turn. The power thus granted was more extensive than the ancient manorial jurisdiction; it had definite limits, and could not be disputed. In the course of time this change was made in such numerous instances among the old manors that a court leet became

almost a regular accompaniment of every court baron. Private leets were now distinguished from the public leet of the sheriff. Nevertheless the private leet is merely a manorial court by grant, an emanation from the royal prerogative jurisdiction, a court of record, which in the King's name summons all the tenants to suit of court (*secta regis*, suit royal); whence also the non-appearance of those bound to suit of court may not be arbitrarily remitted by the manorial lord. The object of the grant is the right to hold police-court sittings (tourn) for a smaller district, to exact fines and taxes (amerciaments, fines, ersoign-pence), and generally, too, a small court-fee (*certum letæ*, cert-money). The lord of the manor is only entitled to the profits of the court; but the court belongs, in legal language, to the King; "the day is to the King." The holder of the court, the steward, represents the person of the King, and must have the judicial qualification of the sheriff in the tourn, and hence the lord of the manor most probably cannot himself hold the court. For non-user, improper summoning, or negligent administration, the Crown can suspend the leet, sequestrate it, or definitely recall the grant; the vacant jurisdiction then lapses to the sheriff's-turn. The local police-court is a branch of the sheriff's-turn, and has accordingly a similar jurisdiction over offences, which are punished according to the common law and the customary system of regulations, or which, according to the newer fines, are referred to the leet, but not over *placita coronæ*, which may only be inquired into as in the sheriff's-turn, and where the public accusation may only be laid by indictment. It is, therefore, to use a modern expression, an "office for examination" and a police-court combined. (4)

(4) With regard to the origin of the local police-courts, *courts leet*, see, for a more detailed account, Gneist, "Geschichte des Self-government," 90, 91, 100–103. The court baron had only a limited right of execution, and no jurisdiction over the police fines which the royal ordinances had introduced (amerciaments). The lord of the manor also, who wished to have an effectual police-court for his manor, was obliged to obtain the royal grant of a court leet, which in process of time became the rule. The manorial elements appear also here overshadowed by the higher judicial and police control residing in the Sovereign. But the possession of a manor is not a necessary condition. Sometimes also a court leet is granted for a village or a single house. Like

V. Hand in hand with this newly constituted tribunal goes the development of a summary procedure in criminal cases, which first gave to the police regulations their full efficiency. As early as the Anglo-Saxon times we hear of a penalty for an offence against discipline, for disregarding the King's commands (oferhyrnes), which is paid with 120 shillings. (Edw. II. 1, II. 2.) In the Leges Hen. I. a similar disciplinary punishment as a penalty for neglecting the royal commands, *oversemnessa regis,* is repeated and extended to further cases. The

the church advowsons in England, the leets became often separated from the estates, and were separately inherited. The procedure before the leet is in the present day a mine of wealth for judging of the procedure in the local courts of the Middle Ages (cf. the chief authority, Scriven on Copyhold). The ordinary court days are held twice a year, in the first month after Easter and Michaelmas. The committees who assist at the finding of the verdict are in later legal language called "juries," but only in the sense of "juries of inquiry," just as in the sheriff's-turn. The duty of attending court is not a consequence of a manorial right, but a duty incumbent upon all subjects, royal suit of court (suit real), and must accordingly be paid in person (with exception of the lords and clergy, as provided in 52 Henry III. c. 10). From the number present, the parish committees are next appointed. In the sheriff's-turn in later times only suitors of twenty shillings yearly arising from freehold or twenty-six and two-thirds from copyhold were to be appointed to form the committee (1 Rich. III. c. 4); but this provision only dates from the end of the Middle Ages, and was not (by analogy) applicable to the private leets. The formation of the court leet is completely detached from feudal principles, seeing that suit of court has no connection whatever with real estate, but is attached to the fact of residence, and according to the strict letter extends to all persons between the ages of twelve and sixty, if they have been resident within the jurisdiction of the court for a year and a day (Scriven, ii. 823, 824). Under the manorial steward there exists a bailiff, whose duty it is to summon to the court day those bound to suit of court. This under-officer has also, alone and without the interference of the steward, to select and summon the jury (Scriven, ii. 837). The steward opens the court, which, as in all royal courts of law, is proclaimed by the bailiffs crying out three times, "Oyes, Oyes, Oyes." Then follows the constitution of the "leet jury," of twelve to twenty-three persons, which in many leets remains a whole year in office, in others is newly formed every court day. In lighter criminal cases, the court leet can pass sentence and inflict the penalty, by fine, amerciament, and lighter punishments provided by special laws. Such cases are, as in the sheriff's-turn, frays, offences against the beer-house regulations, disorderly houses, false weight, offences against the police regulations for bakers, brewers, butchers, and other trades, neglect to mend the roads, failure to do suit of court, refusal to undertake parochial offices, etc., the general object being the maintenance of the public peace and the removal of public nuisances. After the passing of the sentence (*in misericordia est*), the adjustment of the police fine, "affeerment of the amercement," is made by two or three valuers, who, in later times, in accordance with the fundamental rules of Magna Charta, must be appointed from among the *pares*, and very frequently from among the jury themselves. The measure of the money-fine cannot be further called in question, for the writ "*de moderata misericordia*" is only applicable to courts "not of record" (Scriven, ii. 852, 853).

Norman feudal system brought with it a penal system as a portion of its military discipline, which the military commander carried out by inflicting feudal fines (*emenda*) upon movables. Under the name "*misericordia*," "*merci*," this is also known to the Norman jurisprudence, but is apparently of little importance. But since, in England, the whole body of landed proprietors have become the king's *homines*, this fact enabled a criminal jurisdiction for breach of discipline to be deduced to its fullest extent, which was sometimes applied to the old case of the overhyrnes, and at others extended to new cases. In the ordinary way this was brought about by a double act: (*a*) by a Judgment of the Court, which declares the guilty person with his movables forfeited to the King's mercy: "*in misericordia regis est de pecunia sua*," that is, he is guilty of an offence and liable to a fine;—(*b*) by an Act of Execution, by which, according to the rank of the owner, the forfeited property is taxed and charged with a fixed sum of money, "*admensuratur*," "*adforatur*," and when thus determined this sum is called an "amerciament." This last proceeding was a consequence of the Norman financial principle which in order to render a complete valuation practicable, reduces all natural payments, including also forfeited movable property, as far as possible to money payments. **

** The connection between the Norman system of amerciaments and the Anglo-Saxon law can be seen in the following links;—

(*a*) The Anglo-Saxon official penalty inflicted on the royal gerêfa for neglecting his definite official duties, appears in Athlst. I. sec. 5. This is especially threatened, where an unjust judgment has been pronounced (Edg. III. 3); in case of corruption (Athlst. V. 1. sec. 3); for failing to attend the court day (Edw. II. 7. 8); for neglecting to exact penalties (Edw. II. 2); for neglecting official duties connected with the preservation of the peace (Athlst. II. 26, pr. v. 1, sec. 2, VI. 8, sec. 4, etc.). Seeing that any opposition to these disciplinary punishments would, as a rule, certainly have brought about a deposition from office, a summary proceeding could readily be employed in such cases.

(*b*) A further system of the "overhyrnes" is extended as a disciplinary punishment also to subjects, who neglect definite court and police duties, especially neglecting the suit of court (Athlst. II. 20); neglecting the summons to apprehend the disobedient and to pursue peace-breakers (Athlst. II. 20, sec. 2, VI. 7; Edg. II. 7); for infringing the police regulations by engaging a servant, before he has received a certificate of dismissal from his former master (Edw. II. 7; Athlst. II. 22, V. 1; Edw. III. 3; Cnut, 28); and also for non-fulfilment of a judicial sentence, for purchasing outside the privileged markets, and the like. The penalty is in all cases 120 shillings. The Leges Hen. I adopt this customary law under the name of "*oversœunessa*" (Hen. I. 34, sec. 3; 35, sec. 1; 36, 38, 41, sec. 1; 48, sec. 1; 51, sec. 7; 52, sec. 1; 53.

The practice of the Exchequer has here again blended Saxon custom and Norman feudal law together in a manner that seemed most advantageous to the finances. The disciplinary punishment no longer takes the form of a fixed sum, but is graduated according to ranks; for the upper classes more, for the poorer classes generally less, than 120 shillings; according to the probable worth of the movable property. The official fine imposed upon a gerêfa who is liable to be deposed, which in clear cases of neglect of duty had been already inflicted in Saxon times *brevi manu*, had now come to be extended to all vassals, and even to the *libere tenentes*, with respect to the performance of their court duty (*secta regis*). An appeal to a judgment of court appeared, on the other hand, a very dangerous experiment, since the royal steward appoints the judging lawmen, and the fine was proportionately raised where there had been a show of defiance.

Thus the amerciament-system soon followed the arbitrary system of the administration. The untrustworthy, disunited composition of the courts of justice under the Norman præfectural system is the real root of the encroaching police control. The person accused generally forthwith declares himself "*in misericordia regis*," and the fine is now fixed in the Exchequer by the lower officials; higher fines by the superintending officers. In the most important and complicated

sec. 1; 60, sec. 1; 80, sec. 9; 81, sec. 2; 3, 87, secs. 4. 5). It is expressly mentioned that the old fine of 120 shillings is according to the present value equivalent to 50 shillings. But as the Norman feudal law is everywhere grafted upon Anglo-Saxon custom, so now the feudal maxim, which gives the lord the right of levying fines on movable property, coincides with it.

(*c*) The newer system of feudal fines is put into force as a natural attribute of the royal lord. There were, as it appears, no express decrees issued with respect to it; the system was rather introduced in the practice of the Exchequer in the manner described in the "Dialogus de Scaccario," ii. c. 16 (Madox, ii. 439): "*quisquis in regiam majestatem deliquisse deprehenditur, uno trium modorum juxta qualitatem delicti qui regi condempnatur* (1) *aut enim in universo mobili suo reus judicatur pro minoribus culpis*, (2) *aut in omnibus immobilibus, fundis scilicet et reditibus, ut eis exhæredetur, quod si* (3) *pro majoribus culpis aut pro maximis quibuscunque vel enormibus delictis, in vitam suam vel membra.*" The "Dialogus" then refers to the first case: "*cum igitur aliquis de mobilibus in bene placito regis judicatur, lata in eum a judicibus sententia per hæc verba: Iste est in misericordia regis de pecunia sua: idem est ac si de tota dixissent.*"

cases a special commissioner was sent into the country to make the rating, and he rated the men of the county or hundred by the poll. The blending of the *emenda feudalis* with the Anglo-Saxon law accordingly brought about the following changes :—

1. The right to the amerciaments is now established in favour of the under-feoffees also, as against their under-vassals, and is graduated according to the feudal degrees, for the Eorl, and for the baron or Thane (Hen. I. c. 35, 87). Hen. I. c. 41 contains the express assurance : "*unusquisque dominus plenam overseunessam suam habeat secundum locum et modum culpæ de homine suo, et qui sunt ejus super terram suam.*" (1)

2. The new amerciaments are no longer raised in fixed sums, but graduated according to the probable amount of the movable property, that is, according to rank. It appeared now as a royal favour (*merci*) when the guilty party escaped with the payment of a sum of money, less in amount than his entire *catalla*. In the strictness of law, the whole of the movable property is forfeited, "*est in misericordia regis de pecunia sua idem est ac si de tota dixissent.*" The rating "*adforare*" in the Exchequer appears as an act of mitigation by a court of equity. (2)

(1) This new law is partially identical with the older, according to which the Ealdormen, Shir-gerêfas, and lords of manorial courts uphold their official authority by the infliction of small disciplinary punishments (Hen. I. 34, sec. 4; 35, sec. 1; 41, sec. 1; 53, sec. 1; 87, sec. 5), corresponding to the disciplinary penalties which were formerly paid to the Eorl and the hundred (Cn. II. 15, sec. 1). This "*misericordia Vicecomitis*" and of the private feudal lords, however, plays a very unimportant part in the Exchequer accounts, because it was not, as a rule, a subject for the rendering of accounts, and with the decay of the county and private courts, it is intelligible that the importance of the amerciament of the Courts of lower instance should sink also.

(2) We find here also connecting-links with the Anglo-Saxon custom, which for certain offences adopted the forfeiture of movable property. In like manner, in the spirit of the ecclesiastical administration a rating is proportionate to the property of the offender, as is laid down in Athlr. VI. 52, "and always, as one is of the mightier men here in the world or through dignity higher in rank, he shall be punished the more severely for his sins, and pay higher for every wrong he commits, and therefore one shall modify and carefully distinguish rich and poor, and every class, in ecclesiastical as well as in secular penalties." The first assurances of a mitigation of the arbitrary amerciaments in the Carta Hen. I. 1, sec. 8, are accordingly easy to understand: "*si quis baronum vel hominum meorum forisfecerit, non dabit vadium in misericordia totius pecuniæ suæ sicut faciebat tempore patris mei; sed secun-*

3. The number of cases for fine knew no limits now that, going beyond the Anglo-Saxon custom, every act of disobedience against royal decrees was brought under a fine, and thus a mode of compulsory proceeding was initiated, for the purpose of carrying out all possible decrees. Already the Leges Hen. I. c. 13 give a varied list: "*quæ placita mittunt homines in misericordia regis,*" but in which criminal penalties and police fines are mingled together. (3)

4. Submission to the *misericordia,* or the ordinary procedure of the court, are matters of free choice. The previous decision "*in misericordia est*" still, according to the "Dialogus de Scaccario," in case of dispute, admits of the demand of a judicial sentence. Since even in the Saxon period the fixing of official fines as regards the King's personal officials doubtless took place *brevi manu,* the Norman feudal system brought all vassals into a similar dependence upon the King, which made an appeal to the courts of justice somewhat impracticable. (4)

Hence the Norman king became possessed of an arbitrary penal jurisdiction, such as probably no other potentate of the Middle Ages ever possessed. The difference between it and the old system of penalties consists in this, that the existence of the offence and the suitableness of the penalty inflicted is no longer determined by the finding of the community, but by the personal will of the lord or his deputy. It is no longer a question of the jurisdiction of the tribunals limited by custom, but of an arbitrary police and disciplinary control, the influence of which upon the form of the English constitution has not been sufficiently estimated. The application of the same for the purpose of carrying out and extending

dum modum forisfacti ita emendabit sicut emendasset retro—in tempore aliorum antecessorum meorum."

(3) A list of fifteen heads of amerciaments is given by Madox (i. 526); a shorter and incomplete one by Hardy (Rotuli finium, p. xvii. *et seq.*). The number may be conjectured by this fact, that in later times fifty Rotuli were once laid at one time before a Baron of the Exchequer for the purpose of rating them (Madox, ii. 65, 66).

(4) An appeal to the Anglo-Saxon laws, that is, to the ordinary forms of the court, became a very dangerous experiment, seeing that guarantees for a just sentence against the offended lord were very few. The "Dialogus" indicates this clearly enough, i. c. 8: "*Regi, cui militatur, in pecuniam reus judicabitur, nisi festinaverit postulando misericordiam prævenire judicium.*"

the Anglo-Saxon police regulations has been already indicated. The numberless remaining instances furnished by the Exchequer accounts can be summarized under the three following points of view.

I. The system of amerciaments serves in many ways to supplement the criminal law. The cases mentioned in the Exchequer accounts are—the lending of money and weapons to the King's enemies, refusal to work upon royal castles and bridges, the imprisonment of royal servants, insulting royal officials with abusive language, the withholding of goods belonging to another, etc. A special enumeration of offences is out of the question, as the *misericordia* is very frequently mentioned without the reason being given. A separate province is occupied by the "*misericordia de foresta*." Whilst the more serious forest-offences are threatened with penalty of limb or life, the more trivial ones, such as neglecting to mutilate dogs to prevent their hunting, are left to the King's *misericordia*. The secular magnates, bishops, abbots, and others have to pay amerciaments of five hundred marks, a hundred pounds in silver, and similar sums, in cases where men of lower degree would have forfeited limb or life. The general heading "*infractio pacis*" and "*contemptus brevium regis*" was of such wide scope, that at last every royal order could be enforced by amerciaments. In a still greater degree was this the case with the ordinances which were later issued with the advice of the estates of the realm. Offences against these, as "breach of assize," in default of special penalties, fell under this heading. Hence the innumerable amerciaments on account of dispossession of estates (*novell disseisin*), which we find enforced especially against abbots, and secular grandees, their clerks and esquires, and which become the basis of an effective system of real actions and a new theory of possession.

II. The system of amerciaments serves also to maintain the authority of the courts against disobedience in the widest sense (*default, non-appearance*), even against female wards, who do not present themselves, in answer to a summons to

marry; neglect to prosecute a suit, quitting the court without leave, unauthorized compromise (*concordia de pace regis sine licentia regis*), irregularities in evidence, refusal of the duel, failing to appear in the lists, or admitting one person to two duels in one day or, "*quia posuerunt hominem ad aquam sine warranto, sine visu servientium regis*," etc. Where in later times committees of the community are appointed to take evidence, an amerciament is imposed where incompetent men are brought "*pro rusticis adductis ad faciendam juratam; quia elegit rusticos ad assisam; quia recepit hominem ad juratam qui non fuit de hundredo;* it is inflicted upon such as speak to the jury; for false witness and false judgment; for an improper execution of the sentence, "*pro latrone suspenso sine visu servientium regis*," etc., against sheriffs and provosts for improper distraint and the like. Hence arose a method of carrying out reforms in the procedure of the courts by means of simple instructions from the Crown.

III. The system of amerciaments serves also to protect royal privileges against the pretensions of private persons; *e.g.* the illegal raising of tolls, the unlicensed appropriation of the royal prerogative (*purprestura*), pretensions raised respecting public roads and rivers; and generally as an effectual measure against the exceeding of powers of jurisdiction. Thus W. de Friston is fined for passing judgment on a robbery in his court; "*milites Curiæ Comitissæ de Coupland, quia fecerunt judicium de placito, quod non pertinuit ad eos.*" In addition to this interminable system of fines there is still the right of sequestration (the *capere in manum regis*), which is also deduced from the fundamental principle of the feudal grants, often taking effect on very trivial grounds. To what extent sequestration was made use of against magnates, for defaults in the Exchequer, or for not putting into execution the royal decrees, etc., is shown by numerous recorded cases. Thus, the city of London was once taken into the hand of the King for a "trespass of the assize," and its *custodia* was entrusted to a commissioner.

The executive power of the Norman kings has been shown

in a former chapter; this police control exhibits their legal power to maintain peace and order in the country, and the effectual means of authority residing in the sovereign as against his officials and the greatest magnates in the land, and even against the Church. Numberless entries on the Exchequer rolls show how this controlling power extends over persons, communities, and corporations, over spiritual and temporal dignitaries, over the greatest magnate as over the humblest peasant; over the entire population of counties and hundreds, legally unlimited in the number of the cases as in the amount of the fines. The exemptions only refer to the duty of contributing to the ordinary police-fines of the county (common amerciaments), from which the royal demesnes, the property of the Queen, of the higher officers of the Treasury, and by special privilege also of certain magnates, were exempted. The revenues derived from the royal amerciaments are in very rare cases granted to private landowners, such as the Bishop of Bath, and in such cases they are fixed by the King, collected by the royal officials, and the amounts cashed by the grantee at the Exchequer. (Madox, ii. 66.)

The power of the amerciaments has now become the proper instrument for enforcing police regulations and royal orders in every other province. Under this system it first became possible to put the royal ordinances in the place of the older legislative resolutions of the Witenagemôte, and in this manner to restore the mechanism of an absolute government by ordinances with administrative execution. Originally this police system of fines was probably founded upon practical necessity. The insolence of the "Francigenæ," the martial inclination to violence, the wrangling of the Normans among themselves and with the Saxon Thanes, rendered absolutely necessary that strict military discipline for which historians laud the Conqueror. But after a few generations (as in the modern police-organized State), the other side of the picture becomes apparent, namely, the extremely arbitrary working of the system with regard to the lower ranks and the defencelessness of the subjects against any abuse of

it. It is evident how disagreeable to landowners and corporations a jurisdiction under such a system must have become, if they exceeded their authority, and even in its mere exercise. The smallest error made in respect of the forms and limits of their jurisdictions and franchises exposed them to arbitrary punishment and sequestration of their possessions, on the ground of trespasses, contempts, defaults, and false claims of all kinds. It is a marvellous contrast to the condition of things on the Continent, when in England we continually find great estates and great cities under sequestration on account of the official offences or oversights of their bailiffs, for quitting the royal court without licence, and for neglect of the royal commands, and so on. It is also manifest to what arbitrary action of the government both person and property were here subjected, and how later it came about that the first aims of Magna Charta were to secure the fundamental rights of the subject by bringing the amerciaments within the pale of the law: "*Comites et barones non amercientur nisi per pares suos, et nonnisi secundum modum delicti liberi homines, nonnisi per sacramentum proborum et legalium hominum de vicineto.*"

CHAPTER XIII.

IV. The Development of the Norman Finance Control.

Following on our account of the revenue of the Anglo-Saxon kings, the financial system in operation at this time may also be distinguished under the following heads.

1. *Revenue immediately derived from the royal demesnes,* newly founded after the Conquest by an extensive reservation of demesnes and forests, increased by the frequent lapsing of fiefs. The older payments in kind reserved from demesnes and Folkland were from the time of Henry I. turned into money payments, after the fashion of the financial administration of modern times. There still linger on some remains of usufruct in Folkland, the minor Crown rights relating to treasure-trove, wreckage, and derelict goods; as well as the ancient duties payable on wool, sheepskins, and leather (*custumæ*).

2. *Profits arising from the royal authority:*

From the military power arose the right to the services of the inhabitants in building bridges and castles, now effectually enforced by summary amerciaments. But this old source of profit was far exceeded by the new income arising from the feudal law through reliefs, wardship, and marriage.

The fees and fines arising from the exercise of judicial power now poured in abundantly owing to the centralization of the more important actions at the court. Equally productive was the extensive right of forfeiture for felony, and the cases of confiscation of movable property.

Finally, the revenue arising from the police power, flowing in abundantly owing to the unbounded number of police amerciaments.

3. *Beginnings of direct taxation*, including:

The *auxilia*, or aids of the Crown vassals, but only in three fixed and certain cases of honour and necessity.

The *scutagia*, shield moneys, since the time when, under Henry II., the acquittance-moneys for the feudal military service begin.

The *tallagia* from the inhabitants of the towns and the country not liable to any feudal service; taxes which, as the inseparable concomitants of the feudal system, were introduced into England also.*

The first glance shows us at once that the new income far exceeds all the old sources of royal revenue. The Norman administrative system is keen in developing in a fiscal direction every department of State; the undefined arbitrary administration pervades all departments with its endless system of police fines and dues, amerciaments and fines, in a manner which defies every method of arrangement. By becoming centralized in a royal treasury the financial system assumes a new appearance, and following the Exchequer documents, Madox, the great authority on the history of the financial system, draws up the following seven heads, under which all such details are to be included as illustrate the spirit of the political administration.

I. The Royal Demesnes and Forests. These are originally formed of the manors, lands, parks, and forests (*ancient demesne*), more than a thousand in all, which Domesday Book enumerates—constantly increased by lapses and con-

* For the financial system of this and the following period the authorities are: Madox, "The History and Antiquities of the Exchequer of the Kings of England" (2 vols., London, 1769), from which I have here quoted. For the Middle Ages, Sinclair, "Hist. of the Revenue" (3 vols., 1803, 1804); and Cunningham, "Hist. of Customs and Subsidies, etc." (1764), are not of great importance. Other authorities of value are the Treasury Rolls printed in later times by the Record Commission, Hunter, "Magnus Rotulus" (1833); Hunter, "Great Roll of the Pipe," for 1155–1158, 1189–1190 (1844); Rotulus Cancellarii de 3 Joh. (1833); Hardy's Rotuli de Libertate regn. Joh.; Hardy's Rotuli Finium.

fiscations, but also diminished by new grants, and sometimes by lavish waste. Only a part of the demesnes, especially in the neighbourhood of the King's residences, stood, as a rule, under the direct management of the King, that is, of his court officials and personal servants. Those scattered about in the country were included in the *corpus comitatus*, and therefore occur again under the farm rents in the counties. (1)

II. **Fiefs lapsing by the frequent cases of Escheat and Forfeiture.** When, at a later period, England and Normandy became disconnected, the possessions of the Norman lords in England, and of the English in Normandy, were to a great extent confiscated. So long as such estates remain *in manu regis*, they form a portion of the demesnes, with the ground-rents, reliefs, wardships, and rights of marriages appertaining to them. The earlier sub-vassals have now become vassals of the Crown—not of the King as such, "*ut de corona*," but of the King as possessor of the lordship, "*ut de honore*." The greater estates of this sort are given over to special tenants (*fermors*), or stewards (*custodes*); towards the end of the reign of Henry II. they form a special demesne department or Escheatry. Only the smaller escheats are in later times made over to the sheriff, to a separate

(1) The royal demesnes are given by Cowell and others, as 1422 manors, 30 chases, 781 parks, 67 forests. Considering the constitution of Domesday Book, however, discrepancies are easily explainable. As to their formation out of the possessions of King Eadward and the family of Godwine, and from remains of the Folkland, etc., see Ellis, Introd., i. 228, 229. Instead of the usual term, "*terra regis*," we find in Exon Domesday Book, the more exact expression, "*dominicatus regis ad regnum pertinens*." The obligation of all landed estates to military service had also reacted upon the right of the royal demesnes. According to a legal view proceeding therefrom, the real property belongs to the King by virtue of the right of the Crown, and descends to the heir to the throne as such, even when the land has been acquired by the King in his private capacity, or inherited from an ancestor, who never wore the crown (Comyn, Digest, Prerogative, D. 64; Allen, "Prerogative," 154, 155). In like manner the principle of the inalienability of the military fief reflects upon the Crown. As the feudal tenant must leave his ancestral estate to his firstborn, and can only dispose of newly acquired property, the later parliaments were inclined to treat the alienation of the "ancient demesne" as an irregularity; frivolous squanderings were, on demand of the assembly, recalled by "acts of resumption." As to the change of the payments in kind, which still occur, into money payments to the Crown, see Madox, i. 272.

account. When a bishop's see or a monastery became vacant, the Treasury also insisted on the vacant fees being treated analogously, and appropriated the revenues until it was again occupied. For this reason William Rufus left the Archbishopric of Canterbury and other bishops' sees unfilled as long as five years. These temporalities were at first managed by special *custodes*, and later by the Escheatry. (2)

III. **The Feudal Perquisites: Reliefs, Wardships, and Marriage.** The *relevia* are at first arbitrary; from the time of Henry II. they are fixed in the case of single knights' fees at five pounds in silver, or 100 shillings; for groups of knights' fees, forming a lordship, after Magna Charta, 100 marks are paid; for the lordship of an Eorl £100. The profitable wardships were often made over to the vassal of the Crown who bid highest; the dues paid in respect thereof, in the case of great fees, often amounted to several hundred or thousand marks in silver, in one case even to as much as 10,000 marks. Still more various was the financial practice touching the marriage of male and female wards. Thus, for instance, Geoffrey de Mandeville pays 20,000 marks for his marriage with Isabella, Countess of Gloucester, and for the possession of her lands (Hardy, Rot., xxx.). The varied marriage dues are directed to such ends as these; "*ut rex concederet ei ducere uxorem; ut ducat uxorem ad velle suum; ne capiat virum nisi quem voluerit;*" Lucia Comitissa Cestriæ pays 500 marks, "*ne capiat virum infra quinque annos*" (Magn., Rot., 31; Hen. I.); Gundreda Comitissa 100 pounds in silver, "*ne maritetur invita;*" Alicia Comitissa Warewic, 1000 pounds, and ten palfreys, "*quod sit vidua, quamdiu sibi placuerit, ita quod per regem non esforcietur ad se maritandum, et pro habenda custodia puerorum suorum*" (7 Joh.); R. de Seinsperia, on the other hand, pays nine pounds in silver, "*quia renuit filiam Hasculphi Musard.*" (3)

(2) The lapsing of fiefs was manipulated for financial purposes all the more, as the first Norman kings seldom inflicted punishments of life and limb upon their Crown vassals. They exercised with all the more severity their right of sequestrating and confiscating the Crown fees.

(3) The reliefs of the individual knights' fees were already at the time

IV. **The Rents of the Vicecomites and Firmors in the Counties.** These comprise local revenues of all kinds, arising from demesne, dues, fees and forfeitures, and small royalties; which, in the interest of the financial administration, are massed together under the head of "general farm." Where, in the place of a farmer, a *custos* administers, he must render a special account, and deliver up the surplus after deducting the expenses of management. (4)

V. **The Fines and Amerciaments,** the latter of which have been already explained under the system of police administration. The fines are royal dues in the widest sense of the term, and are just as characteristic of the system of this administration as the amerciaments with which they are often confounded. The position of the King led to a number of arbitrary powers, or circumstances, under which he could either grant or deny. It appears here to be an unchangeable maxim that nothing which can be refused is granted without a money payment; a maxim, the reminiscence of which enters even into the administrative system of the present day. The

of the "Dialogus de Scaccario" (ii. c. 10) fixed at 100 shillings (Madox, ii. 426). The reliefs of greater estates are in the "Dialogus," ii. 24, still *ex bene placito*, and only in later times fixed at 100 marks for a barony (Madox, i. 318); the line between the two has been evidently drawn by the practice of the Exchequer. The practice of the profitable feudal wardship will appear from a few examples: Will. de St. Marie Church pays 500 marks for the wardship of R. Fitz-Harding, "together with his whole inheritance, knights' fees, female marriage," etc.; Simon de Montfort even pays 10,000 marks for the "*custodia terrarum et heredis*" of Gilbert de Anfranville until the majority of the heir, "with marriage, church patronage, knights' fees, and other appurtenances and vacancies." In frequent cases the wardship appointments are again recalled, because afterwards a person has been found who offers more (Hardy, Rot., xxxi.). Still more multifarious are the instances collected by Madox and Hardy as to marriage. I may here remind my readers that the relative value of money in the eleventh century is generally fixed at ten times that of the present day. The owner of a small English knight's fee pays accordingly at each change of possession, 100 shillings = $7\frac{1}{2}$ marks = 100 thalers, in silver value equal to about 1000 thalers of our money; the possessor of a greater lordship, 100 marks, or about 13,300 thalers of our money. The maximum value of a wardship might amount to 10,000 marks; the value of a feudal marriage even to the double of that.

(4) The rent (*firma*) of the sheriff is only a collection of the middle and small revenues which were to be raised within the bounds of the county, or the special farm district. Even the earliest Exchequer accounts of 31 Henry I., contain rents of 400 and 500 marks, which prove how extensive the jurisdiction of the county court must have been at that time. As to the regulations affecting the individual accounts in the *firma Vicecomitis*, see Thomas, "Exchequer" (51).

people of that time appear to have felt this system more as a burden than as an injustice; for the King had the formal right to act as he did; he proceeded in the same manner in Normandy, and the Norman lords vied with the Exchequer wherever they could. The endless list of fines can be grouped, in some measure, under three or four chief heads:—

1. *Fines for Liberties and Franchises.* The right of the landowners to hold feudal and manorial courts was often of doubtful origin, and the extent of the jurisdiction also might be called in question. The deficiency was then made good by a fine. For instance, Lucia, Countess of Chester, paid 100 marks for the privilege of pronouncing judgment in her Curia between her vassals (Madox, i. 397, 398). Certain counties under Henry III. obtain in this manner their own right of election, that is, the right of nominating their own sheriffs. In like manner the men of Devonshire pay twenty-three and a half pounds in silver, and the freemen of the counties of Dorset and Somerset similar sums, for leave to choose their own sheriffs (Madox, i. 417 *et seq.*). In this manner the towns obtain the beginnings of self-government: London pays a hundred marks for the privilege of choosing its sheriffs (31 Hen. I.); Carlisle ten marks for electing its coroners; Cambridge three hundred marks in silver and one mark in gold for leave to have its own *firma* and exemption from the interference of the sheriff of the county; Lincoln two hundred marks for *firma burgi* and a single immunity from *tallagium*. Sometimes exemptions, immunity from *tallagia*, disforestings, and the like, were permanently granted upon a high fine being paid; but then fresh dues were paid for the renewal and confirmation of such immunities, especially under a new government.

2. *Fines in Actions at Law.* From the time of Henry II. these were unlimited. The King grants permission for suits to be brought in the Royal Supreme Court instead of in the defective county courts, and at the same time for an improved procedure in taking evidence (*recognitio*, jury), but only on payment of fees. Hence the innumerable fines, "*ut haberet*

justitiam et rectum;" that is, the permission to bring the action at court instead of in the county. Each single writ is sold, sometimes even with special sums in the event of success. Every step in an action, entering one court instead of the other, notably every inquest by jury, presupposes a fee. Thus, R. de Luci pays fifteen marks and a palfrey to obtain an inquisition, "on the oaths of twelve good men," as to what dues and services were owed him by his tenants in Coupland; W. de Mahurdin, twenty shillings for an inquest, whether he holds his land by serjeantry or as a knight's fee. In one case four marks are paid, for substituting in the assize six knights instead of six others alleged to have been bribed. Numerous fines are further paid that the King may "help the plaintiff to his right;" for instance, on one occasion, two hundred marks, that the King may assist to recover a debt from the Jews. More numerous fines still arise to obtain despatch in a matter. Frequently the parties offer beforehand a quarter, a third, or a half of the sum they claim. Sometimes this offer takes the form of a bilateral "*sponsio,*" so that either both parties offer a sum, to obtain the same object (concurrent fine), or each of the two wagers upon the opposite issue of the decision (counter-fine). Just as equivocal are the great fines for the King's "favour," protection, mediation, "*ut Rex juvet eum versus N.;*" "*ut Rex manuteneret eum.*" Under John, a stay or delay of the legal proceedings was even granted in return for money: "*Robertus de Amouesdal debet V. marcas pro habendo brevi de protectione, ne ponatur in placitum de aliquo tenemento suo nisi coram Rege vel per breve Regis; et ut sit quietus de sectis et hundredis, et de omnibus placitis et querelis, excepto murdro*" (Rot. 2 Joh.). "*Decanus et Capitulum Londoniæ II. palefridos, pro protectione ne vexentur contra libertates cartarum suarum*" (Rot. 2 Joh.). In criminal matters, also, the rigour of the penalties and amerciaments was frequently mitigated by the previous payment of a fine. The instances generally refer to Norman magnates: "*O. de Lerec debet XX. marcas argenti, ut rex perdonaret ei et Osberto clerico suo malivolentiam suam*" (Magn.

Rot., 31 Hen. I.). "*R. c. de CLXX. Marcis argenti, ut rex perdonet ei malivolentiam suam pro filia Geldewini de Dol.*" (Ib., 31 Hen. I.). Further payments were made "*pro habenda gratia et benevolentia regis,*" etc. Counties, hundreds, and sheriffs pay sums of a hundred marks for an "indulgent procedure," "for a peaceful hearing," and the like. To these must be added fees for release from prison, or other favours. The Dean of Ely pays one hundred marks for the release of his concubine and her children; the wife of Hugo de Neville two hundred hens for leave to pass a night with her husband. To this category belongs also a fine, "*pro licentia comedendi.*" Instead of suffering a sentence of capital punishment, which has been pronounced, permission was sometimes given, on payment of fees, to enter a monastery, "*ut liceat transferre se ad habitum religionis*" (Rot. 5 Joh.).

3. *Fines for concessions of favour in respect of offices, guilds, and dispensations,* notably for persons who on payment of fees receive their father's office, or an office for their relations, or the grant of the office of sheriff, or a special farming at the old farm rent. Even the offices of Chancellor and Treasurer are often granted on payment of great sums as purchase-money. Conversely, fees are paid for release and discharge from an office, or for relief from responsibility, sometimes also "*ut rex faciat recipi compotum sine ira et indignatione.*" Further, fees for the granting of trade and industrial privileges, especially for the renewal of the *gildæ,* for licence to export corn, and so on. After 19 Henry III., and probably even earlier, orders were periodically issued to the sheriffs, "*quod omnes illi, qui de nobis tenent in capite feudum unius militis vel plus, et milites non sunt, arma capiant et se milites fieri faciant.*" On payment of fees "dispensations" are also granted; hence the numerous fines "*pro habendo respectu de militia.*"

4. *Fines for regranting of Fiefs and for Alienations.* A portion of the Exchequer documents on this subject are printed under the title "Rotuli Finium," and contain important dealings respecting the inheritance and alienation of Crown fiefs.

This classification is sufficient to show what a continual source of wealth the fines were to the royal Treasury. Crown vassals made an additional payment in such cases as "*aurum reginæ.*" (5)

VI. **Aids, Tallages, Scutages.** (6) In principle the knight's estate is certainly held free from all taxation of villeins, "*quietum ab omnibus gildis et omni opere,*" as solemnly confirmed by the charter of Henry I. But the feudal *auxilia* reserved to the King extraordinary contributions on the occasion of the knighting of his son, the marriage of his daughter, and, in case of necessity, for his release from captivity. (*a*)

The common taxes, *tallagia,* were raised from time to time as need required from royal towns and farmers on the royal demesnes. Although the reorganization of the military system had led to the exemption of the smaller freeholders from the military service and from the burdens of the militia, yet the feudal system deemed it necessary to retain a fair compensation by levying a subsidy in the form of occasional money contributions (*tallagia*). An inseparable concomitant of the feudal system, the *tallagium* ("taille") made its appearance

(5) The fines are arranged by Madox, i. 395, 425, 456, under numerous headings, for which I have substituted a more simple arrangement. Hardy, "Rotuli Finium," makes three classes: (1) Fines for the concession and confirmation of liberties and franchises; (2) fines for proceedings in an action, with five sub-divisions; (3) mixed fines with ten sub-headings. As to the division into voluntary fines or "oblations" and involuntary fines, see Hardy, Introd., xviii. As to money payments for permission to choose their own sheriff in the county, see Madox, i. 416, 417, 420; Hardy, Introd., p. xxix. As to the additional payment of the *aurum reginæ*, Ellis, i. 172.

(6) The beginnings of a direct taxation are classified by Madox as aids, tallages, and scutages; partly for substantial reasons, and partly because the names in early times are confused. Madox adds also to this group the *customæ*, the customary duties on wool, sheepskins, and leather, which I have already mentioned above as ancient sources of revenue. The goods liable to duty were wine, general merchandise, and wool. The old duty on wine was called "prisage," that is, the tenth cask from every ship at the price of twenty shillings. The second customary duty (general merchandise) was, as a rule, in the form of one-fifteenth or a similar proportion, and was paid as a fee for licence to trade. The toll on wool remained until the reign of Edward I. in a very irregular state. (Stubbs, ii. 523.)

(*a*) The *auxilia*, aids, were, by right, limited to the three enumerated cases. But as the subfeodaries were fond of extending these cases, and as, in its analogous application to the royal boroughs and demesne villages, the notion was still further extended, there resulted a general tendency to extend the aids to other cases of need, which, after the times of Magna Charta became the beginning of the grant of subsidies by the estates of the realm.

in England with the Conquest; and the strong political development of the feudal system insisted that all classes should be as far as possible proportionately burdened. As, in fact, the old popular army, which existed side by side with the feudal militia, had never been expressly abolished, and indeed from the time of Henry II. had gradually been revived, the practice of the Exchequer dealt with the possessions of farmers and of towns in some degree according to the analogy of the feudal estates proper, by confining the *tallagia* and *auxilia* to cases of honour and necessity, though such cases received a more comprehensive interpretation than where the feudal tenants were concerned. Hence aids and tallages are frequently taken together, and are denoted as "*dona*" or "*auxilia*," or by other more courteous terms. The towns, in order to avert a too rapid return of taxation, often payed voluntary *dona*, "*pro bono adventu regis*," "*pro dono novi anni*," "to conciliate the King," and so on, which all flow together with the system of the fines. (*b*)

The shield-moneys, "*scutagia*," afterwards became still more important. The constitution of the feudal militia, brought over from Normandy, appeared, in the long run, not quite suited to the insular position of England. So soon as the internal affairs were settled, it was no longer a question

(*b*) The *tallagia* (Madox, i. 693, secs. 732–751) are a specific creation of the feudal system. The greater landed proprietors, who as a standing army had taken upon themselves the defence of the realm, demanded that those landowners who were not bound to knights' service should pay their proportionate share in money. The insolence of the armed and war-skilled classes in France designated all the rest as "*taillables*," and from the landlords' point of view as "*corveables*." In England also the "*taille*" was enforced so much as a matter of course, that even the great and powerful city of London, in 7 Hen. III., paid 1000 marks; 26 Hen. III., 1000 marks; 37 Hen. III., 1000 marks, in addition to twenty marks in gold; 16 John, 2000 marks, *tallagia*. The hardship lay in the uncertainty of the cases and of the frequent recurrence of the taxation. In England two special reasons concurred which gave the classes liable to the "*taille*" a peculiar claim to more equitable treatment. The first was the retention and later revival of the militia by the assize of Henry II.: the "*taillables*" were here never an unarmed class, but, on the contrary, in every generation did good service alike against the rebellious barons and against the Scotch invaders. The other reason lay in the "*firma burgi*;" in order to raise the fee farm rents of the towns in times of necessity, certain towns were promised that their contributions should not be increased, which now furnished a reason for continual claims, and also for disputes as to the amount of the taxation.

of short campaigns at home, but of a number of permanent garrisons, and long campaigns against Wales, Scotland, Ireland, and France. For both needs the feudal militia with its short-service system was insufficient. Hence the Norman kings at all times kept a paid soldiery, and allowed some of those liable to military service to buy themselves off for certain campaigns. According to a trustworthy authority, in the second year of Henry II. the prelates were for the first time allowed to pay twenty shillings per fee instead of furnishing a soldier for the campaign against Wales. The first general imposition took place in 5 Henry II., for the campaign against Toulouse, with two marks per fee from all Crown vassals, under the name of "*donum*." In 18 Henry II., for the army in Ireland, partly actual service and partly money payments, under the name of "*scutagia*," were accepted. In like manner in 33 Henry II., for a campaign against Wales, twenty shillings per fee were raised "*a militibus qui non abierunt cum rege*." From this time the imposition of scutage instead of personal service became more and more regulated, payable by all *tenentes in capite* alike "*de corona*" and "*de honore*." The paying Crown vassals are then allowed to raise from their sub-vassals the same sum per fee "*ut haberent scutagia sua*." Occasionally the King raises them immediately by royal order from the sub-vassals *in manum suam*. The raising of the new fee-duty from that time constitutes a new official duty of the sheriff, who, on being appealed to, lends the Crown vassals assistance in exacting the *scutagia* from their under-vassals. (*c*)

VII. The final heading, **Accidental Income**, embraces treasure-trove, goods cast away by the thief (waifs), wrecks,

(*c*) As to *scutagia*, Madox affords us the complete history of its gradual origin. The "Dialogus de Scaccaria" recognizes the *scutagia* as a financial practice; "*Fit interdum, ut imminente vel insurgente in regnum hostium machinatione, decernat rex de singulis feodis militum summam aliquam solvi, marcam scilicet, vel libram unam; unde militibus stipendia vel donativa succedant. Mavult enim princeps stipendiarios quam domesticos bellicis exponere casibus. Hæc itaque summa, quia nomine scutorum solvitur, scutagium nominatur.*" As to the early combination of the expressions, "*auxilia*," "*scutagia*," "*tallagia*," "*hydagia*," and "*dona*," see Madox, i. 580, 680.

the movable property of felons, of persons executed, of fugitives, and of outlaws, deodands, and other smaller royalties, which, where they have not been granted to private persons, are for the most part raised and exacted by the sheriff. Dating from the Anglo-Saxon period, the common obligation of the inhabitants to make roads, bridges, and fortresses (*trinoda necessitas*) still continues, as also the foraging of the royal servants on journeys (*purveyance*) which in later times became a standing public grievance. Finally, the so-called "Danegeld," which in spite of its abolition under Eadward the Confessor, was still raised from certain estates. (7)

Considering this accumulation of sources of income, it can well be understood, how the myth arose that the Conqueror raised a daily income of £1060 30*s*. 3*d*. from contributions (Ordericus, Vit. iv. p. 523), one of the numerous exaggerations of later historians, which perhaps is based upon an arbitrary counting up of the highest amounts of revenue in certain years, whilst under later reigns the most favourable financial balance scarcely reached a sixth of that income.

(7) As an item of the Accidental Income (Madox, i. 342) the Danegeld is also mentioned in the legal books (Edw. Conf. 11; Hen. 10, sec. 1, 15 Cart. civ. Lund. sec. 2; Madox, i. 686-694. Thomas, "Exchequer," p. 41; Sinclair, "Revenue," i. 69, 70, 72). This payment was expressly abolished under Eadward the Confessor, and is mentioned in Domesday Book in one passage only (Stamford, 336 b). Nevertheless, it occurs very frequently in the later revenue accounts, especially under Henry I. as an impost upon certain estates. This difficulty, which is remarked both by Freeman and Stubbs, can be explained by the following consideration. The Danegeld as a lawful tax, was abolished, and remained so, but the old valuation of the productive returns of ordinary lands for the raising of the former tribute was often retained on the occasion of the later exaction of "*tallagia*," "*dona*," "*auxilia*," to avoid making a fresh valuation each time. The old established rate on the productive returns was therefore called Danegeld. Now it is perfectly correct that the general ground-taxes (*carucagia, hydagia*, etc.), re-introduced in later times, correspond to the scale of the old Danegeld taxation. But it is very comprehensible that in the laws and ordinances the hated name "Danegeld," with its humiliating memories, was studiously avoided. Every revival of "*Danegeldum*" would have had the preposterous result, that the numerous exemptions from the tax would have revived also, whilst in the course of business in the Exchequer no one scrupled to denote the old taxation of the produce of an estate subject to the common burdens by the term "Dane-money."

Though the most recent English historians describe the gradual formation of a new system of land taxation in this epoch as a disguised revival of the Dane-money, this in nowise describes the position of affairs; but the course of events will probably be more correctly represented in the following account.

Among the manifold sources of revenue to the Crown, undeniably the most important for the future of the Exchequer and the Constitution was the *scutagium*, which arose under Henry II. from the conversion of the feudal services into money; because, according to the position of affairs, in time a uniform land-tax was naturally developed from it, and from that a uniform income-tax, which can be followed up from its first beginnings in this place to the close of the period.

After the privileged landed proprietors, from the greatest Crown vassals downwards, had been subjected to heavy money contributions, which were equivalent to the actual burdens of feudal service, that impediment had been overcome in England which on the Continent caused the failure of land and income tax. As soon as the governing class has been made to contribute in proportion to its means, the development of a just and rational system of taxation meets with no more obstacles. At first a uniform hide-tax could be levied; for the unprivileged landowners could certainly not withdraw themselves from a uniform taxation of the hides, when the privileged classes were taxed in full, in proportion to the amount of their possessions. The farmers of the demesne and the cities had been already included, paying taxes just as the knights' fee estates did under the names of "*tallagia*," "*dona*," "*auxilia*;" being, in fact, taxed quite as often as, and even oftener than, the knights' fees; and this although their landed property had been certainly valued quite as highly. But all other tenants of the great feudal estates found themselves in the same position; for the lord had at last no other way of raising his *auxilia*, *scutagia*, and *relevia* except by taxes, protection-moneys, rents, and work done by his dependants. Already under William the Conqueror, during the great and heavy distress of war (A.D. 1084), the expedient had been adopted of levying a uniform hide-tax throughout the whole country. This was done at a time when no Domesday Book had been compiled, and the division of the feudal burdens was beset with insurmountable diffi-

culties. In view of the threatened Danish invasion at that time, a war-tax, of an amount till then unheard of, being seventy-two pence for every hide, was levied, by which the whole of the landed proprietors in the country were induced to take the universal oath of allegiance, and to accept its consequences (A.D. 1086). A similar situation arose a century later, when the levying of a "Saladin tithe" for a Crusade (A.D. 1188), and the ransom of Richard I. from captivity (A.D. 1193), required the immediate raising of unheard-of sums. The feudal burdens meanwhile were fixed and distributed by the Exchequer, and the vassallage, true to the tendency of all tax-paying landowners, clung as long as possible to the scale of contributions according to the register. Hence on these occasions land-taxes were levied cumulatively upon all landed property; but the *auxilia* of the knights' fees were still rated according to the scale of the scutages, the other estates according to hides, and therefore the last-named tax was designated as "*carucagium*." As early as the year 1198, under Richard I., a general taxation of the landed estates was resumed, in which a uniform impost of five shillings was raised upon each *carucagium* or hundred acres of land (Stubbs, i. 510); not an immoderate rate, but one which nevertheless met with opposition among the great proprietors, and especially among the clergy, and could not be raised without difficulty. It was natural that the feudal possessors should not willingly acquiesce in such a sudden change in the scale of levying; *i.e.* according to acreage instead of the feudal register; wherefore it came to pass that afterwards the *scutagia* were, for a time, raised separately from the *carucagium* on such estates as did not owe knights' service.

As in this way a simultaneous taxation of the whole of the landed property arose, there was naturally connected with it a simultaneous taxation of movable property. The *tallagia* of the demesne farmers, towns, and tenants, were estimated not only according to the income of landed property, but according to the total capability of performance on the part of the subjects, and accordingly the personal property was

similarly estimated, which in cities, owing to their industry and trade, was of considerable importance. The very first endeavour made to include this source of income proportionately, led to a taxation according to percentage or fractions of the total income, which, from the time of Richard I. onwards, gradually appear in addition to the land-taxes as tenths, elevenths, thirteenths, seventeenths, and other fractions. The Saladin tithe of the year 1188 is again the first precedent for a uniform taxation of personal property, which was levied cumulatively with the land-tax. For Richard's ransom, there was levied at one and the same time a *scutagium* from the knights' fees, a *carucagium* from real estate, and a proportion of their income from the cities and from the rest of the population. In this an improvement was distinctly visible on the valuation system of the *tallagia*, against which only the clergy raised objections on its being afterwards repeated.

The modes of taxation that had thus come into practice were immediately abused by King John in his own fashion. Even in the first year of his reign, John increased the *carucagium* from two to three shillings, the *scutagium* from £1 to two marks, and levied the latter from year to year. In the year 1203 he levied one-seventh on the personalty of the Crown vassals, in 1204 an *auxilium* from the knights, and in 1207 one-thirteenth on the personal property of the whole country. Against these innovations there naturally arose an opposition on the part of the Crown vassals, and, indirectly, of the whole nation. It was the crown vassals who, in the first place, were thereby injured in their rights of possession. The levying of scutage had been established without opposition, so long as it was only levied in moderate sums, as a favour accorded to those feudal vassals who did not serve in the campaign. But now a payment of this kind was to be extorted regardless of the question whether the feudal vassal wished to serve in person or not, whether a campaign was intended or not, or whether a case of honour or necessity had arisen, which obliged the feudal vassal to pay a pecuniary aid. Herein lay a fundamental alteration of the

original conditions under which the military fees were granted and held; the feudal estates were thus reduced to the level of the common landed estates which were bound to a *carucagium*. But the greatest wrong done to the Crown vassals was undoubtedly the rough-and-ready exaction of a seventh on their personal property, which placed the *tenentes in capite* upon the same footing as the *talliables*. Such demands had certainly not been made upon them since the days of William Rufus and his treasurer, Flambard; and against such a course of action the charter of Henry I. had given the solemn promise that the military fees should remain free from all demands beyond their military duty (Charters, p. 101). The time had arrived when an agreement with the Crown vassals, and their consent to the imposition of *auxilia* and *scutagia* could no longer be dispensed with; and thus the taxation question had reached the stage of Magna Charta (cap. 18).

CHAPTER XIV.

The Norman Exchequer.

As the financial system is the centre of gravity of the sovereign rights of the Norman State, so it is also the foundation and basis of the permanent offices and official institutions of the State. The hereditary monarchy has found a stronghold in its new demesnes and in its feudal suzerainty, upon which rests the defensive strength of the regenerated State. But this political system is also pervaded by a financial spirit, which goes far beyond the mere necessities of existence, and does not shrink from subordinating even the administration of justice to the interests of revenue. As long as the spirit of the Norman sovereignty is paramount in the history of England, finance is the centre of all government; where provinces, districts, and towns were all subjects of general or special fee-farm tenure, the most important administrative council could only have the character of a financial department, similar to a "war and demesne chamber," or a "general directorium" in the later constitutions of the Continent. This is the meaning of the Norman Exchequer (*Echiquier*); and having regard to its paramount importance I shall proceed at once to discuss the origin and external form, the procedure, and the *personnel* of the Exchequer in connection with the financial control.

I. The Origin of the Exchequer. It is not in itself improbable that the Conqueror organized his financial department according to the custom in Normandy, where an "*Echiquier*"

had a prominent position in the twelfth century as the highest government department and court of law. The English Exchequer is, indeed, only a part of the *Curia Regis*, and is accordingly styled in official language *Curia ad Scaccariam*. But in contradistinction to the other functions of the central government, which are merely temporary and periodical, the Exchequer forms the one firmly organized governmental department, "*Curiarum omnium apud Anglo-Normannos antiquissima*" (Hickes, Diss. Epist., p. 48), in which the current administration appears united. The name "*scaccarium*" is referred in the Dialogus, i. 1, to the diapered cloth which, for the purpose of calculating accounts, was spread out like a chess board over the table, round which the sittings were held. "*Scaccarium tabula est quadrangula, quæ longitudinis quasi decem pedum, latitudinis quinque, ad modum mensæ circumsedentibus apposita, undique habet limbum altitudinis quasi quatuor digitorum, ne quid appositum excidat. Superponitur autem Scaccario superiori pannus in Termino Paschæ emptus, non quilibet, sed niger, virgis distinctus, distantibus a se virgis vel pedis vel palmæ extentæ spatio.*" Year after year we find a number of great functionaries and royal officials, with numerous clerks, assembled round this account table, employed in receiving payments from the sheriffs, the special farmers, and *custodes*, in scrutinizing their accounts, and giving receipts; imposing and receiving periodical aids, tallages, and scutages; appointing the sheriffs and other *fermors* and *custodes*, and calling them to account; deciding legal disputes within their administrative jurisdiction; directing payments to be made for the needs of the royal family, their trains and servants, for war supplies and garrisons, for paying the King's creditors from loans, and for administrative expenses of all kinds—all this being done under the personal superintendence of the King, or according to his actual or supposed personal pleasure. Consonant with these functions, two divisions were early formed: (1) the account department, or *scaccarium majus;* (2) the receipt department, or *scaccarium de recepta, recepta scaccarii, scaccarium inferius*. The one division after-

wards had its office on the right, the other on the left side of Westminster Hall. The rooms where the sittings were held were often distinguished; the state session-room with the throne was *scaccarium*, in the narrow sense of the term; and the smaller council-room, *thalamus baronum*. These words, which are always ambiguous, denote alike the place of the official administration, and the functionaries themselves; the chamber, in which the specie is actually deposited, is specially called *thesaurus regis*. (1)

(1) As to the origin and external form of the Exchequer, the chief authority is the "Dialogus de Scaccario," a treatise upon the law of the Exchequer, which Madox (part ii.) has printed, and furnished with copious notes. It gives evidence of the early matured development of the administrative machinery, and is a marvellous testimony to the official views respecting the State, such as is hardly to be found elsewhere in the Middle Ages. Gervasius Tilburgensis was formerly regarded as the author; Madox (ii. 334–345) assigns it to Ricardus, Filius Nigelli, a court chaplain of Henry II., afterwards Bishop of London, and grandnephew of Roger of Salisbury, the great minister of Henry I. Its date may be fixed with tolerable certainty for 1178. In later times the institutions of the Exchequer have again been the subject of an exhaustive monograph, printed for private circulation by F. S. Thomas, "History of the Exchequer" (1846); and another publication of Thomas (also unpublished), "Notes of Materials for the History of Public Departments" (1846). Certain Treasury Records have been printed by the Record Commission. The oldest existing Rotulus, called 5 Stephen (edit. Hunter, 1833), may be placed, on convincing evidence, as early as the 31st year of Henry I. As to the institution of the Norman *Echiquier*, see Madox, i. 162–165; Warnkonig, Französiche Reichs- und Rechts-Geschichte, i. 346; Schäffner, Französische Staats- und Rechts-Geschichte, ii. 408, 409. Its introduction from Normandy is proved by the "Dialogus de Scaccario," "*ab ipsa regni conquisitione per regem Wilhelmum facta cæpisse dicitur, sumpta tamen ipsius ratione a Scaccario transmarino*" (Dial. i. 4), as well as by the Latin terminology of the Exchequer. In any case that evidence proves the existence of the Exchequer under William the Conqueror, though an actual importation from Normandy cannot be substantiated. My former view (after Floquet, Histoire du Parlement de Normandie, p. 8), that a Norman Exchequer-roll was existing as early as the year 1066, is certainly based upon an error (Stubbs, i. 377), but so is also the opinion of Bishop Stubbs, that the *Echiquier* of the island of Sicily was imported into England by an English Exchequer clerk, Thomas Brown (see the "Transactions of the Academia Reale," of Rome (28th April, 1878); all the existing legal records, and Treasury rolls of Normandy are of so much later origin, that it cannot be proved from the later constitution of the Norman *Echiquier* that the English was formed after its model. (See also Libermann, "Einleitung in den Dialogus de Scaccario," Göttingen, 1865.) The controversy is after all merely nominal; for the close connection of the judicial and finance administration was in the Middle Ages everywhere a matter of course, and, even if the name of *Echiquier* arose earlier in Normandy, yet the English institutions were so closely connected with the county government, and the machinery was so finely developed by the officials under Henry I. and Henry II., that the material part of the institution certainly belongs to the Anglo-Norman state.

II. The course of business in the Exchequer embraces in its early arrangement—

1. *Payments into the Treasury.* These are made in the counting-house (office of tellers) in gold or silver coin. The pound (*livre*) of the Norman period is an actual pound of silver of twenty-four half-ounces, and is divided into twenty shillings, and the shilling into twelve pence. The silver penny (*denarius*) is the regularly minted current coin. The mark in silver is accordingly thirteen shillings and fourpence; the shilling about the value of a Prussian Thaler. The gold mark is equivalent to nine silver marks. These values are fairly permanent. It was not until Henry VI. that the coin had lost about a third of its silver contents. But the irregularity of the coinage, as well as the depreciation caused by wear, and by forgeries, led to special precautionary measures. In the case of payments *ad scalam*, sixpence in the pound was demanded "to make good weight;" in payments, *ad pensum*, more than sixpence. Where the purity was doubtful, a smelting test was applied; but this also was remitted on payment of one shilling per pound (nominal combustion). The payment is entered in an account book, and from this transferred to a strip of parchment, called the "bill," or "tellers' bill." This strip of parchment falls through a pipe-like opening into the "tally court," where a "tally" is made of it. This tally is a piece of dry wood, on which the "cutter of the tallies" has to cut notches corresponding to the sum paid; whilst the "writer of the tally" writes the sum down on both sides of the wood in figures. According to the length of the incision, one notch denotes £1000; another £100; £20; 20*s.*; 1*s.*; and so on. The chamberlain splits the notched stick down the middle in such a manner that each half contains the written sums and the incised notches. The two matching parts thus split asunder are called "tally" and "counter-tally," or "tally" and "foil" (folium). The one is retained by the chamberlain; the other is kept by the payer as a receipt and proof to be produced to the account department of the Exchequer. (It was not until 1783, by 23

Geo. III. c. 82, that these notched sticks were done away with in the Exchequer, and checks substituted for them.)

2. *Payments out of the Exchequer* are made on a royal order (writ, or mandate), under the great or privy seal, generally addressed to the treasurer and chamberlains. The usual formula for this purpose is called a "*liberate*." Orders for payments which recur periodically, such as salaries, are called "*liberate current*," or "*dormant*," and are couched in such terms as the following: "*Rex Thesaurario . . . salutem; Liberate de thesauro nostro singulis annis quinque Capellanis nostris ministrantibus in Capellis S. Johannis et S. Stephani Westmonastrii, duodecim libras et decem denarios pro stipendiis suis*" (29 Hen. III.). In the course of time, for the purpose of control, other mandates are inserted. Thus the royal writ is deposited on the account side of the Exchequer, and on the strength of it a "treasury warrant" is issued by the treasurer or some member of the Exchequer staff. Acting upon this warrant, the auditor sends an order to one of the tellers, which is then countersigned by one of the Exchequer officials, and in this form is finally honoured.

3. *The book-keeping* of the Exchequer, divided into the "*rotulus annalis*," the "*memoranda*," and other day books, was early arranged in a technical form. The chief book is the *rotulus annalis*, "the great roll of the Exchequer," the most stately and important record, into which (according to Madox, ii. 112) the accounts of the royal revenues flowed through different channels, as rivers pour themselves into the ocean. These *magni rotuli pipæ* (so called on account of their being rolled up in the shape of a tube), arranged according to counties, have been preserved in their entirety since the first year of the reign of Henry II. (with the exception of two years). Partially printed by the Record Commission, they form the most comprehensive source for studying the administrative law of the Norman period.

4. *The rendering of accounts* in the Exchequer. The most important accounting parties were the sheriffs of the counties. A great part of the demesne, feudal, and judicial dues passed

through their hands, besides numerous disbursements for munition of war, equipments, and salaries. Their duty was not merely to receive and pay over moneys, but also to deal with complicated accounts and receipts. And thus months generally passed away from the provisional payment (*profer*) until the definite sum was fixed (*summa*). Many amounts, such as confiscated *catalla*, and incomes from sequestrated property, which appeared in the account in round sums, had to be scrutinized in detail. Disbursements are only passed on presentation of a "warrant of discount," and must be regularly justified by the King's writ; and in the case of regularly recurring disbursements, there must at least be a rescript of the Exchequer. For the repayment of loans contracted by the King, orders for payment are issued upon the sheriff's yearly rent by writs of "*allocate et computate*." The accounting party must appear in person, and is previously sworn "*de fideli compoto reddendo;*" although sometimes an account is accepted "*per fidem*" or "*per verum dictum*." Occasionally, by royal writ, and later by Treasury rescript also, the presentation of accounts by a clerk, as attorney, is allowed. The final acquittance was often so liable to hitches, that the accounting parties pay sums of several hundred marks to be quit of the responsibility for themselves and their *servientes*. Similarly the accounts are presented by the fee-farmers and bailiffs of the towns, the escheators, the "customers," or special receivers of tolls, and all those who have been entrusted by the King with a special administration (bailwyck). Later, the travelling judges have also to render accounts. (2)

(2) As to the proceedings in the Exchequer, and especially as to the order in which the functionaries sat at the council table, see Thomas, Exchequer, p. 1 *et seq.* *The payments into the Exchequer* are dealt with by Thomas, Materials, p. 5. For comparisons of the coinage arrangements of the Anglo-Saxon period, see Schmid, Glossarium *s.v.* Geldrechnung.

As to the *disbursements out of the Exchequer*, see Madox, i. 348-350, 362-389. The chief authority is the Dialogus, i. c. 6 (Madox, ii. 373). In later times the numerous controls were further increased; in the time of the Stuarts "a letter of discretion" was drawn, in which the treasurer denoted the special fund from which the payment is to be made; upon this the parliamentary allowance or disallowance of the disbursements was based.

As to the *book-keeping*, see Madox, ii. 456 *et seq.*; Hunter, Introduction.

5. *The Exchequer court days.* For the settlement of disputed and legal points which arise at the presentation of accounts, the higher functionaries of the Exchequer assemble periodically and hold sittings, which are called "*scaccaria*," and are described in the Dialogus de Scaccario, ii. c. 1, as follows:—

"*Præcedente namque brevi summonitionis, quod Regiæ auctoritatis signatur imagine, convocantur ad locum nominatum qui necessarii sunt. Accedunt autem quidam ut sedeant et judicent, quidam ut solvant et judicentur. Sedent et judicant ex officio vel ex principis mandato Barones, quorum supra meminimus. Solvunt autem et judicantur Vicecomites et alii plures in regno, quorum quidam voluntariis oblationibus quidam necessariis solutionibus obnoxii sunt rei.*"

The individual accounting parties are summoned thither with the warning, "*Sicut te ipsum et omnia tua diligis*," and a notice of the separate amounts due, "*annotatis omnibus debitis seriatim cum causis*," and with the concluding clause, "*Et hæc omnia tecum habeas in denariis taleis et brevibus et quietantiis, vel capientur de firma tua.*" Those who failed to appear were summoned *realiter* by the sheriff or the "huissier" (usher of the Exchequer), fined in an amerciament for every day they neglected to come, and in case of need arrested, and their whole property sequestrated by a writ "*de nomine districtionis.*" On defalcations being detected, immediate arrest took place. Landed proprietors and corporations also, claiming a franchise, were obliged to appear every year in the Exchequer, when the sheriff presented accounts, and to give account themselves as to the returns, out of which they then were allowed so much as was due according to the terms of their privileges. Failure to appear or refusal of account incurred sequestration. When the King had, as an

pt. i. As to the so-called Rotulus, 5 Stephen, see Madox, ii. 462. As to the more correct date, 31 Hen. I., Reeve's History, i. 218, and the Introduction to the Rotulus Pipæ, de anno 31 Hen. I.

The presentation of accounts is described in detail by Thomas, Exchequer, p. 49–58. Examples of the presentation of accounts by special fermors and financial officials are given in great numbers by Madox (for example, the control of the coinage, Madox, ii. 132).

exceptional case, himself received an account in person, or *in camera sua*, this was notified by writ to the Treasury. (2[a])

The administrative principles of a demesne department with such full powers, naturally produced for the Exchequer important legal prerogatives, and were the source of the present *privilegia fisci* in England. The decisions of the Exchequer appear as the oldest form of an administrative justice. According to its constitution, the Exchequer is certainly no chief court of law, but is only intended "*ad discernenda jura et dubia determinenda, quæ frequenter ex incidentibus quæstionibus oriuntur*" (Dial., i. 4). But the Norman financial system is inseparably blended with all the branches of public and private law. The fixing of fines and amerciaments, the decision of appeals against the imposition of *tallagia* and other imposts, involved a jurisdiction extending in all directions over the prerogatives of sovereignty. All privileges of the lords of manorial courts and towns, all liberties and franchises, in the sense in which they are used to-day, *i.e.* all royal grants, the legal validity or extent of which are called in question, are here decided. In every dispute as to a Crown fee, just as in every grant and inheritance of a fee, the Exchequer is an interested party. The *debita regis* have first to be satisfied, in every administration of the estate of a deceased person. From the litigation in ordinary private law also ("*communia placita*," in contrast to those in which the King has an immediate interest) the

(2[a]) The Exchequer court-days in their characteristic form, according to the Dialogus de Scaccario (Thomas, and Madox, ii.), have also a certain influence upon the later forms of procedure in the central courts. The *privilegia fisci*, which proceeded from the practice of the Exchequer, had permanent results. Where any one was at once a debtor of a King and of a private individual, the "*debitum regis*" must be paid before all else. A debtor of the King cannot dispose by will of his personalty to the prejudice of the King; and his heirs cannot obtain the administration of his personal estate, if he has died intestate, without the leave of the Exchequer. In case the solvency of the estate is doubtful, the King undertakes its sequestration, calls in outstanding claims by way of administration, and satisfies himself first, with reservation, however, of the burial expenses. Debtors to the Exchequer are also, on demand, allowed a "writ of aid" against their debtors, that by getting in their debts promptly they may be enabled to satisfy the official claims. Herewith are connected at a later period a number of the provisions of Magna Charta.

fiscus derived an interest, from the fact that the Exchequer assisted a debtor to the *fiscus* against third parties, to put him in a position to fulfil his obligations towards the King. Hence it can be explained how the Exchequer in meting out administrative justice drew also common civil actions before its tribunal. According to the Leges Eduardi, civil suits were, indeed, to be decided by a *judicium parium;* but this provision was formally satisfied by the Exchequer choosing its higher officials from among the Crown vassals, "*barones scaccarii,*" in whom even the greatest feudatory was compelled to recognize a properly constituted court.

III. The staff of the Exchequer is divided into the higher officials and the clerks. As all departments of the central government meet together in finance, so all the great officials of the State had a seat here, in person or by representatives. The personal presidency was reserved for the King himself; and in this capacity he acted for centuries. Where a Chief Justice, "*capitalis justicia,*" had been appointed by the King, the latter is represented by him. Under Henry II. this chief judge had become a permanent official; the Dialogus de Scaccario accordingly mentions him as the president, and the higher judges as "*barones scaccarii,*" as important officials, but whose appointments were revocable: "*Illic enim residet Capitalis Domini Regis Justicia, primus post Regem in regno ratione fori, et majores quique de regno, qui familiarius Regiis secretis assistunt; ut quod fuerit sub tantorum præsentia constitutum vel terminatum, inviolabili jure subsistat. Verum quidam ex officio, quidam ex sola jussione principis resident. Ex officio principaliter residet imo et præsidet primus in regno, Capitalis scilicet Justicia. Huic autem assident ex sola jussione Principis, momentanea scilicet et mobili auctoritate, quidam, qui majores et discretiores videntur in regno, sive de clero sint sive de Curia. Assident inquam ad discernenda jura et dubia determinanda, quæ frequenter ex incidentibus quæstionibus oriuntur*" (Dial., i. 4).

In order to understand the position of the Barons of the Exchequer we must remember that they form a supreme court set over the great farming *Vicecomites,* amongst whom

are often to be found the first men of the realm, bishops, grand feudatories, etc.; and that their judgment decided questions of law even against prelates and Crown vassals. It was natural, therefore, that the controlling officials in the supreme court should be men of similar position, *i.e.* persons with the necessary rank in the feudal or ecclesiastical hierarchy. The *Barones* were accordingly those among the magnates of the realm who were the most skilled in business, and who stood nearest to the King. The highest court dignitaries have a place of honour among them; as have also the Chancellor and the Treasurer, who gradually became the principal personages among the Barons of the Exchequer. All these higher functionaries bear the name of "*Sedendi ad Scaccariam;*" the latter name, "*Residentes ad Scaccarium,*" includes also the under-officials.

The under-officials are difficult to classify, for in the earliest records a large number of persons are comprised under the denotation "*Clericus Scaccarii;*" Madox has, however, with great labour ascertained the individual classes, and arranged them into two groups. The most important under-officials in the account department are: the Remembrancer as keeper of the register and despatcher of business, the *Ingrossator Magni Rotuli,* the Constable and Marshal as representatives of the State functionaries of the same name in the Exchequer, the Usher (Huissier), and in later times the *Auditores Compotum* as revisers of accounts. The chief under-officials of the receipt department are: the *Clericus Brevium,* the Chamberlains as keepers of the chest, the *Clerici Thesaurii,* the Tellers as cashiers, and the officials appointed for weighing the coins and applying the smelting test. (3)

(3) For the official staff of the Exchequer, see Madox, i. 197; for the under-officials, Madox, ii. 263 *et seq.* To the under-officials of the account department belong (1) the Remembrancer, *Rememorator,* registrar, keeper of the register, despatcher of business. (2) The Ingrosser, *Ingrossator Magni Rotuli Pipæ;* sometimes two functionaries of this sort, frequently persons of aristocratic families. (3) The Usher, or doorkeeper, entrusted with the safety of the buildings, the money-chest, and the registry; and at the same time doing duty as a Huissier, who receives the customary fees for summoning the sheriffs to the Exchequer sittings. From the time of Henry II. it was an hereditary office, even divisible and descending to women. The one en-

The spirit of centralization collected together in the Exchequer the whole of the State finances. The other exchequer offices which are found existing are of secondary importance, and in the majority of cases were temporary institutions. For the personal disbursements of the King there is a household treasury with special *clerici* and a *Thesaurarius cameræ*. Sometimes secondary and local exchequers were formed for temporary purposes, as, for instance, a "*Scaccarium redemptionis*" and a "*Scaccarium*" at Worcester. A more important secondary department is the "*scaccarium Judæorum*," under the "*custodes*" or "*justiciarii Judæorum*," having jurisdiction over all affairs relating to the Jews, and comprising numerous clerks and under-officials. The special constitution of this procedure and the attributive justice of this administrative body is so characteristic, that the condition of the government under King John cannot be described more appropriately than by saying that the whole central government had adopted the character of the Exchequer of Jews. (4)

feoffed of the "Serjeanty" appointed the acting Huissiers for this office—a curious custom which continued into the 19th century. (4) The Constable, an under-official appointed by the Constable of England, so long as that office existed (Dial., i. c. 5). (5) The Marshal, an under-official provided by the Marshal of England, having certain functions to perform connected with the presentation of accounts (*forulus marescalciæ*), and with the right to take arrested persons into his keeping (Dial., i. c. 5). (6) *Auditores Compotum* (Madox, ii. 290, 291), revisors of accounts, mentioned first in 9 Edw. II.; originally this business was conducted by clerks appointed *pro hac vice*, or by the barons themselves (Thomas, Exch., 122, 123). (7) Clerks of estreats, who were also of later origin, for the exaction of the amerciaments, fines, etc.

The second group of under-officials belongs to the receipt department, "*Recepta Scaccari*," the "*Scaccarium inferius*." (1) The *Clericus brevium*, clerk of the writs; (2) The Chamberlains, a higher class of under-functionaries, curators of the chest, are appointed by the Grand Chamberlain and the Court Chamberlain of the King as their representatives, and ought properly to be knights; the current business is conducted by special *Clerici Camerariorum*; (3) *Clerici Thesaurarii*, treasurer's clerks—among them is prominent the Clerk of the Pells, bookkeeper of the *Magnus Rotulus de Recepta*, mentioned in Henry III.; (4) The Tellers, the real cashiers or pay-officials, usually four or more; (5) The Pesours and Fusours, under-officials employed in weighing the coins, and applying the smelting test, originally hereditary offices, Serjeanties united with landed estates, hereditary and divisible. Besides these, goldsmiths for the testing the metal, essayers, and other assistant-officials were engaged at salaries as they were wanted.

(4) The Exchequer of Jews is described by Madox, i. 221 *et seq.* Its existence is explained by the original absence of legal rights in the Jews, whose position may be compared with that of the German "Kammer-Knecht

des Kaisers," and who were not merely subjected to unsparing *tallagia*, but were bled in every way at pleasure, sometimes under the name of "protection right," and sometimes of a "right of occupation." This view of the *fiscus* is unequivocally declared in the Leges Edwardi Confessoris, sec. 25: "*Ipsi Judæi et omnia sua regis sunt. Quod si aliquis detinuerit illos vel pecuniam eorum, rex requirat tanquam suum proprium, si vult et potest.*" Since they have no *persona standi in judicio*, no landed property, and no right of inheritance, and their legal capacity depends upon the royal favour alone, arbitrary conditions and payments are attached to their legal intercourse. First, their right to bring actions in their contracts with Christians was only recognized when the terms of the bond were to be found in the chest of the Jewish secretary (chirographer). The inheritance of their property is only allowed on payment of heavy fines. For example, Henry III. demands six thousand marks of a widow for the personal estate of her deceased husband. The causes and pretexts for the imposition of amerciaments are of course innumerable. One of the most common was for marrying without the royal consent. At times all Jews were thrown into prison, and then released on payment of heavy fines, on one occasion of sixty-six thousand marks; on another occasion the Jews were pledged to the Earl of Cornwall for a loan of five thousand marks. Hence the numerous "ransoms," "compositions," "fines for protection," and "licences" in the Jewish administration. In return for great sums, they were allowed important privileges. For instance, in the Charta 2 Joh.: "*ut si Christianus habuerit querelam adversus Judæum, sit judicata per pares Judæi. Et Judæi non intrabunt in placitum nisi coram Nobis*," etc. In the fifth year of John's reign a formal jury was formed of "*legales Christiani et Judæi.*" For this department, under Richard or earlier, a separate and secondary exchequer of "*custodes*" or "*justiciarii judæorum*" was told off, consisting at first of Christians and Jews together, at last composed for the most part of Christians, appointed under the great seal. They have jurisdiction in all matters touching Jews, such as the scrutiny of the accounts presented, the decision of actions arising out of Jewish contracts, and disputes touching their landed property, their personalty, taxation, fines, and forfeitures. Under the *justiciarii* stand the *chirografarii* and *coffrarii* (who preserve in chests the charters and bonds between Christians and Jews), as local officials, appointed in places where a considerable number of Jews dwell. From the practice of this secondary exchequer a special Jewish finance law becomes formed, "Law, Assize, or Custom of Judaism;" under Richard I. the judges on circuit have instructions given them as to this custom (*capitula de Judæis*). In the short period from 50 Hen. III. to 2 Edw. I. (1265–1273) the Crown was credited with £420,000 "*de exitibus Judaismi*" (Coke, Inst. ii. 89). The whole institution comes at last to a sudden end through the expulsion of all Jews from England (19 Edw. I.); in consequence of which act they remained for 364 years entirely banished from the country. The number of the expelled Jews was 15,060 (D' Blessier Tovey, Anglica Judaica, Oxford, 1738; J. M. Jost, Gesch. der Israeliten, Berlin, 1820–28, vol. vii. pp. 102–171). As to the other secondary exchequers, and provisional payments in other places, see Madox, i. 262–271.

CHAPTER XV.

V. The Rise and Decay of the Norman Church Supremacy.

This fifth and last division of the sovereign power took a different course in the Norman period. In the same degree in which the temporal government became consolidated under an absolute monarchy, the Church advanced in the direction of a Romanizing centralization, which confronted the power of the Crown by the equally strong power of the Pope. In the middle of the period this made a breach in the system of absolutism.

William the Conqueror had not under-estimated the influence of the Church. He had found her an influential power under Eadward the Confessor, and in possession of about a third of the revenues of the soil. With her support the new throne was won, the sanction of the Pope was the sole indisputable title to it, and the lower clergy were the class upon which the obedience or the opposition of the masses in a great measure depended. The feudal and ecclesiastical States were obliged to form an alliance with one another to attain their culminating point. The Conqueror recognized this relation in a number of concessions.

England adopted the Roman Liturgy, and submitted to the ritualistic precepts of the Papal Chair. The assurance of liberal and punctually collected Peter's pence was very welcome to the Curia. The celibacy enjoined upon the clergy still met with a passive resistance, which was only gradually overcome after the time of Henry I.

The liberal endowment of the Church in its archbishoprics, bishoprics, chapters, monasteries, and other foundations, is not only maintained, but extended by many new gifts and ecclesiastical foundations. The monasteries especially increase under Henry I., Stephen, and Henry II., in such a manner that their number is computed in the "Notitia Monastica" at three hundred. At the close of the period the Church is said to have been in possession of about the half of the soil of the country, but this probably means only the half of the ground rent of the greater estates.

The ecclesiastical jurisdiction over clerical persons and matters is recognized in all its ancient extent, and also is from this time forth separated externally from the temporal courts. The Anglo-Saxon union of bishop and ealdorman for the purpose of holding common court days for clerics and laymen was in the highest degree antagonistic to the spirit of the Roman ecclesiastical government. The Earl had now retired from the position of president of the county court: the co-operation of bishop and Shir-gerêfa was all the less likely to be acceptable to both parties. The internal contrast between the spirit of the popular court and that of the ecclesiastical district court had made itself more and more felt, and the desired separation of Church and State was in this point conceded. This step, so characteristic of the legislative power of the time, is taken towards the end of the Conqueror's reign by means of a writ addressed to the *Vicecomites* (Charters, p. 85), but with the assurance that it is taken "*communi concilio et concilio Archiepiscoporum et Episcoporum et Abbatum, et omnium principum regni.*" Sec. 2: "*Propterea mando et regia auctoritate præcipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam quæ ad regimen animarum pertinet, ad judicium secularium hominum adducant, sed quicunque secundum episcopales leges de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit vel nominaverit veniat, ibique de causa vel culpa sua respondeat, et non secundum hundret, sed secundum canones et episcopales leges rectum Deo et episcopo suo*

faciat. (*Judicium vero in nullo loco portetur, nisi in episcopali sede, aut in illo loco quem ad hoc episcopus constituerit.*)" The summoning of the parties before the now independent ecclesiastical courts took place under threat of excommunication; "*et si opus fuerit ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibeatur.*" Futhermore, the *Vicecomites* and royal bailiffs are forbidden to interfere with the course of business in these courts. Upon this separation the "*Curiæ Christianitatis*" take with them the consideration of such secular matters as had, chiefly for external reasons, been left to the spiritual authorities, when both were formerly united.

The "*Leges episcopales*" here form a contrast to the "*Leges Eduardi,*" embracing as they do all that was formerly decided according to the rights and customs of the clergy. In the now independent ecclesiastical courts, the applicability of the *jus canonicum,* of the Decretals, and of the resolutions of the *Concilia,* is, with very few exceptions, regarded as a matter of course. Thus there arose a jurisdiction over matrimonial matters, wills, and indirectly over questions of legitimacy and the inheritance of personalty, over verbal contracts, tithes, church dues, and church sees, which was independent of the temporal power; a penal jurisdiction for the maintenance of orthodox doctrine and Church discipline, and for the punishment of bigamy, incest, fornication, and other offences against morals; and a more and more sharply defined magisterial authority over the whole of the clergy. To this was added an appeal from the ecclesiastical decision to Rome, and to the practice of the papal legates, and thus was formed an almost sovereign power within the political state.*

* The separation of the ecclesiastical jurisdiction into separate courts took place at a time of extreme tension, in which the imperial proclamation of the Norman military feudal law still met with resistance. Hence it is easy to understand that the Conqueror resolved upon a concession, which satisfied the most cogent demands of his superior clergy, and shortly afterwards rendered possible the act of homage at Salisbury. The contents of the decree as to the separation of the spiritual jurisdiction is quite clear. The word "hundret" designates the secular place of justice, in which also the county courts were held. The independence of the *Curia Christianitatis,* however, did not exclude the obligation of the clergy to do suit of court (*secta regis*) in their capacity as Crown vassals. What the Leges Hen. I., sec. 2, contain on this point was the established law of feudal custom.

The Conqueror plainly recognized the possibility of this consequence, and endeavoured to avert it by the following checks drawn from both the old constitution and the new.

I. The ancient rights of the Anglo-Saxon State over the Church were retained, especially the royal ratification of the resolutions of the Councils. In the year 1108 we still find the *canones* of the Ecclesiastical Council in London adopted "in the presence of the King, with the consent of his men." In the year 1127 Henry gives his consent to all the resolutions passed in an ecclesiastical Council, and ratifies the same by his royal power and authority (Stubbs, i. 374). By virtue of the King's right of making decrees, the clergy are forbidden to leave the kingdom without royal licence, to recognize a Pope without royal direction, to publish circular letters from Rome before they have been seen and approved by the King, or to pronounce sentence of excommunication upon a royal vassal without the King's permission. In like manner the right of appointing bishops or abbots was preserved according to old custom. These appointments are now made on high court days, after hearing the spiritual and temporal magnates. Very frequently a royal chaplain, in any case a man in whom the King had personal confidence, was appointed bishop. To these old conditions the Conqueror added a new and comprehensive arrangement.

II. The great landed possessions of the clergy are considered, according to the system of the feudal suzerainty over the whole land, as granted to be held under the same laws of tenure as the baronies and knights' fees; that is, with the full burden of the feudal services, suit of court, and feudal dues. This theory was applied to the estates of about one hundred and fifty bishoprics, chapters, abbeys, and greater parishes; but not to the glebe-lands, tithes, offerings, and fees of the ordinary parishes. Thus was solved an old problem of the Anglo-Saxon military organization. The bringing of the rich ecclesiastical estates, with their thousands of interests, into the feudal register of the realm was a step of great significance, and it was the more popular because the

great bishoprics and monasteries were thus compelled to adopt subinfeudation, by which means many old landed interests of Saxon Thanes were preserved, and many new ones created. The interest of the temporal lords urgently demanded this equalization. The Church had not hitherto been able to claim more than an equality with the highly privileged landowners. The administration endeavoured here to enforce the new order of things with certain indulgence. A number of monasterial estates retained their customary immunity as "tenures of frankalmoign." A portion of the feudal services remained in arrears, and was excused. For a long time in the Exchequer accounts the scutages of the prelates were divided into two classes—into those "*quæ recognoscunt*," and "*quæ non recognoscunt*," the last named remaining in abeyance. In ordinary practice no personal military service was required of the spiritual lords; in their case a remission of feudal service for money payment was first allowed. An indulgent spirit towards the clergy is also visible in the matter of aids, amerciaments, and sequestrations.**

III. In the same way, all the other sovereign rights are also enforced against the clergy. The military summons is issued to all ecclesiastical vassals in the usual form; generally, therefore, through the *Vicecomes*, and with like effect. The Exchequer accounts show that even bishops and abbots were fined on this ground, and had their estates sequestrated.

** According to the later investigations of Freeman and Stubbs, this application of the Norman feudal system to the landed estates of the Church certainly did not take place instantly: for the theory of the forfeiture of their landed property, by "rebels," and of the "redemption" of possessions on the part of the rest of the landowners, was inapplicable to the landed estates of ecclesiastical corporations. But since the great act of homage at Salisbury, the universal obligation to fealty, to feudal services, and to feudal payments was derived from the legal act of investiture and the feudal oath; numerous indications bear witness that under William Rufus the notorious Flambard applied all the consequences of the feudal law to the ecclesiastical estates also. The practice of the Exchequer, the Constitutions of Clarendon, and the fully developed theory of the English feudal law, as it is laid down in the legal work of Glanvill, show the application of the feudal system as a completed fact (Stubbs, i. 298, 299, iii. 357, and other passages). Connected therewith is the energetic retention of the investiture of the greater estates of the clergy, which lay as much in the interest of the Crown as in that of the temporal vassals.

Under Henry III. there occur even summonses to the clergy to do personal service in the army.

To the judicial power both higher and lower clergy are so far subjected, that they have to do suit of court (*secta regis*) both in the county court and in those court commissions which were immediately formed by the King. It was only a more indulgent practice which, permitting them to be represented in the county assembly, limited the compulsion to find the verdict in person to the *curia regis;* and here also no participation in passing a death sentence was demanded from the prelates. In their character of vassals of the Crown, they remain passively subject to the royal court; "I do not condemn a cleric and a servant of the Lord, but my Earl whom I have placed over my realm," said William I., when he personally arrested his brother, Bishop Odo.

The clergy with their tenants are subject to the police control, as a consequence of the temporal judicial supremacy; the Exchequer accounts show us that all the new police laws and the practice of amerciaments were enforced, even against the highest clergy.

In like manner the Norman exchequer accounts show that the financial supremacy of the King is also exercised against the clergy. Money claims of the King upon a *clericus* were first exacted from the fief by distraint; failing this, an order was issued to the bishop to seize the *beneficium* of the cleric, "otherwise the King will come upon the bishop's barony." All feudal incidental payments, "*relevia*," "*auxilia*," "*scutagia*," are extended to the Church. For the revenues derived from wardship and marriage, which are here absent, the King compensates himself by withholding the temporalities of the bishop's see, which under William Rufus sometimes remained vacant for five years. As a matter of course, the old common burden of the *trinoda necessitas*, which since Henry II. receives a new importance owing to the revival of the militia system, is also incumbent upon the clergy.

According to the Conqueror's calculation, the maintenance

of the royal authority thus appeared secured, even after the concession of a separate ecclesiastical jurisdiction; and the first three kings of the Norman period remained upon this basis virtually masters of the Church. The dispute about investiture under Henry I. ended in a compromise, by which the King renounced the enfeoffment with ring and sword, but reserved to himself the full feudal suzerainty.

The usurpation of the throne by Stephen, however, caused a severe shock to the royal authority. The exclusiveness of the episcopal jurisdiction was declared in an oath extorted from the King; the interference of the papal legates and the appeals to Rome increased to such a degree, that Stephen's successor found before him the difficult task of establishing afresh the old order of things.

A century after the Conquest, under Henry II., the Church and State had arrived at a turning-point in their mutual relations, and the position of the Church had now become much more favourable and popular than it had been at the commencement of the Norman period. What the Church had lost, by its subjection to the feudal State, had been retrieved upon the ground of moral influence; for to its other callings a new one had now been added. In the dissensions of nationalities it had become the natural mediator, the nearest protectress of the oppressed Saxon element, the sole power whom the Norman kings at their court days were at times obliged to meet on the footing of negotiation. Even though the high prelates had become Norman, yet the great mass of the clergy still belonged to the Saxon population. Saxon "clerks" were the chief staff of the Norman administration, necessary interpreters to the French-speaking lords, and not uninfluential intercessors for the mass of the oppressed classes. The corporate spirit of the clergy had advanced far enough to uphold, amidst the discord of nationalities, the unity of the Church, which on that very account could not be subject to the haughty class of nobility. And under these circumstances it was very significant that Henry II. himself appointed a man like Thomas Becket to the archbishop's see;

one who by birth belonged neither to the Norman nationality nor to the privileged class.***

Under such altered circumstances Henry II. saw himself involved in a critical struggle with the ecclesiastical power, in which he was in the end unable to recover full political power over the Church. With her separate administration (*jurisdictio*) she everywhere opposed the temporal jurisdiction. The maxim of separation of Church and State had led to this, that the lower clergy for three generations found their law and discipline entirely in the canon law, their ideal in complete severance from the laity; and that a very influential party among the clergy, especially in the monkish orders, stood resolutely on the side of Rome. The Church was free from the fiscal odium of the secular administration; she had the popularity which surrounds all forces that resist an absolute government. Henry II. did not dare, under these circumstances, to carry out the re-establishment of the royal prerogatives without summoning to his aid the most powerful and influential persons among the laity. He summons accordingly (1164) in the formal manner of a "*cour de*

*** For a time the ecclesiastical influence was diminished owing to the fact that the ranks of the clergy had become internally disunited. Since the year 1070 the Conqueror had filled with Norman clerics the two Archbishopries of Canterbury and York, and then by degrees the bishopries and the most important abbeys also. The curious state of things arose that the higher clergy were not able to speak to their flocks so as to be understood. The dislike of the Saxon population to a foreign tongue and foreign customs was now extended to the dignitaries of the Church. Among the numerous successful upstarts of the times were to be found many adventurers belonging to the clerical profession. The majority of the important ecclesiastical dignities were, however, so far as can be ascertained, filled by worthy persons. Daily labour in the ecclesiastical calling, the feeling of solidarity against the arrogance and violence of the military vassals, and the powerful corporate spirit of the clergy (increased by the gradually enforced celibacy) appear in the Anglo-Norman Church with unmistakable plainness. But on the other side is visible in the first century of this period the strong personal influence of the King over his prelates, who have been for the most part court chaplains and royal secretaries. "The cohesion of the Church was for ages the substitute for the cohesion which the divided nation was unable otherwise to realize. . . . . It was to an extraordinary degree a national church, national in its comprehensiveness as well as in its exclusiveness. . . . The use of the native tongue in prayers and sermons is continuous; the observance of native festivals also, and the reverence paid to native saints. The ecclesiastical and the national spirit thus growing into one another supplied something at least of that strong passive power which the Norman despotism was unable to break" (Stubbs, Const. Hist., i. 245).

baronie" the greater Crown vassals and prelates, collectively and separately, to attend the extraordinary assizes of Clarendon and Northampton. At the opening of the first-named assembly, in January, 1164, sixteen articles were presented and carried, which concern the ancient powers of the ecclesiastical supremacy. The chief article (No. XI.) is as follows :—

"*Archiepiscopi, episcopi, et universæ personæ regni, qui de rege tenent in capite habeant possessiones suas de rege, sicut baroniam; et inde respondeant justiciariis et ministris regis et sequantur et faciant omnes consuetudines regias, et sicut cæteri barones debent interesse judiciis curiæ domini regis, cum baronibus, usque preveniatur in judicio ad diminutionem membrorum vel mortem.*"

By this (1) the subjection to the feudal jurisdiction and to all feudal burdens was declared anew; and with it also the temporal penal jurisdiction over the persons of the clergy was recognized in principle. Where clerical offenders are examined in an ecclesiastical court a secular judicial official is to be present, and the convicted offender is not to be further protected by the Church. Feudal vassals of the King shall be outlawed only after previous trial, and with approval of the royal court.

(2) The highest appellate jurisdiction of the King upon English soil was retained, and the parties are forbidden "*ulterius procedere*" (that is, to appeal to the Papal Chair) without special leave (Art. VIII.): "*De appellationibus, si emerserint, ab archidiacono debent procedere ad episcopum, et ab episcopo ad archiepiscopum. Et si archiepiscopus defecerit in justicia exhibenda, ad dominum regem perveniendum est postremo, ut precepto ipsius in curia archiepiscopi controversia terminetur, ita quod non debet ulterius procedere absque assensu domini regis.*"

3. The royal rights of appointing to vacant bishoprics and abbeys were especially and formally recognized. The revenues of the vacant sees fall to the royal Treasury, until the time for the new election has arrived. The formal

election takes place in the King's chapel, and with his consent, and there, before being consecrated, the "*electus*" must take the oath of allegiance to the King as his feudal lord in respect of his temporal fees, with reservation of his ecclesiastical rank.

These and other principles were compiled from precedents, and were, as "ancient customary law," so indisputable, that the bishops, as well as the secular vassals of the Crown, recognized them without hesitation. Thomas Becket knew these principles, and had applied them for several years when he was chancellor; and accordingly, after some resistance, found himself compelled to make an unwilling concession, and to promise to keep these articles "*legitime*" and "*bona fide*." When, however, by means of the clause "*salvo jure ecclesiæ*," and under the authority of the Pope, he continued his resistance, the King formed a decisive precedent by obtaining from a well-attended court of spiritual and temporal vassals of the Crown, on the 17th of October, 1164, the condemnation of the primate *in misericordia regis*, which was then in the customary manner reduced by the King to an amerciament of £500. But the hard-earned victory was lost again owing to the passionate and intriguing conduct of the King, the violent issue of the dispute, and the martyrdom of Becket. At the final conclusion of peace, great points were yielded to the Church, especially the appeals to the Pope. By later articles the principal point was conceded to the Pope's legate, viz. that for the future no cleric should be summoned to answer for a crime before a temporal judge, except on account of a secular fee, or of an offence against the hunting laws. The other points of unpleasantness to the clergy were also for the most part omitted. In its further development the concession of a separate judicial jurisdiction led to the privilege of milder punishment, under the term of "benefit of clergy."

Under King John the Curia advanced still further, and in the course of a dispute between the King and the Chapter of Canterbury, succeeded even in procuring the appointment of the primate under papal authority, and, in the further course

of the dispute, the free canonical election of the bishops, as well as the feudal suzerainty over the English Crown.

Thus the relationship to the Church became the one weak point in the system of Absolutism. Towards the close of this period the old relations between the higher clergy and the Crown become changed. Whereas formerly the King was sure of seeing in the bishops' sees only prelates who were known and personally subservient to him, from this time onward the ecclesiastical corporate spirit designates the dignitaries of the Church by canonical appointment. The charter of 15th of January, 1214 (Stubbs' Charters, 288), touching the freedom of ecclesiastical elections, has especial influence on later centuries. It was this "Charter of Liberty," afterwards confirmed by 25 Edward I. stat. 6, sec. 2, which considerably altered the character of the English episcopal bench up to the close of the Middle Ages. Under Henry III. the papal power had reached the zenith of its might in England, and this, in consequence of the realm being overrun by foreign clergy, led to a reaction on the part of the land-owning gentry as patrons of the churches. The influence of the King is now confined to withholding the temporalities during the time a see is vacant, and to the moral influence of the feudal oath of fealty; through which, by the withholding of the temporalities, a renunciation could be compelled "of all the clauses of the Papal Bull, which were opposed to the royal prerogative, and the law of the land." The breach in the absolute royal power which was here made could not be healed in the course of the Middle Ages. It was the first opening, by means of which Magna Charta introduced the beginnings of parliamentary privileges.

NOTE TO CHAPTER XV.—The course which the ecclesiastical disputes took in the Norman period forms the standard for estimating the inherent strength of the absolute monarchy, and must for this purpose be set forth connectedly.

Under William I. the concessions concern merely the immediate wishes of the Church: a separate ecclesiastical jurisdiction, the Peter's pence, and the moderate inculcation of celibacy. William had also no objections to the doctrine of transubstantiation. On the other hand, he rejects with proud resoluteness the demand of Gregory VII. for a suzerainty, and the taking of the oath of allegiance, asserts his supremacy over the Church in all external matters, and assures himself of

the due exercise of it by reserving to himself the *placet* to the publication of all circular letters from Rome, and by reserving his consent to all Councils, all *canones*, and to the excommunication of any royal vassal (Eadmer, Hist., p. 6, Wilkins, Concilia, i. 199).

William II. misuses his fiscal rights against the Church, as in other directions; leaves, among other things, the Archbishopric of Canterbury vacant for nearly five years; and is soon involved in a quarrel with Archbishop Anselm as to the taking of the oath of fealty, in which temporal and spiritual vassals take the King's part. A Council of the year 1097 resolves that "the archbishop has to leave the realm within eleven days."

Henry I., who by a cunning usurpation of the throne had anticipated his elder brother Robert, was dependent upon the support of the clergy, and accordingly recalls the archbishop, Anselm, who again refuses the oath of fealty. After a long dispute Henry I. declares in a Council of the year 1107, upon his absolute authority, that the investiture with the ring and the staff, the symbol of the conferring of the *spiritual* office by the King, or a lay patron, should for the future be abolished.

Under Stephen, the usurpation of the Crown brings confusion into this question as into others. By extensive promises Stephen brings the higher clergy over to his side, who then become faithless to all the vows formerly made to the Empress Matilda; but later they also leave King Stephen in the lurch. In 1138, things had come to such a pass, that in the Council of Westminster a papal legate promulgates sixteen canons, and takes into his own hand the conduct of the elective act for appointing to the Archbishopric of Canterbury. In the course of a few years the Papal Chair becomes the court of appeal for all contending factions.

Henry II., in a difficult position, thinks to secure his royal prerogatives by choosing his favourite and chancellor Thomas Becket, but finds at once in him an ambitious, energetic, and equal opponent. In 1164, the principal dispute is fought out at the Assizes at Clarendon and Northampton, when again spiritual as well as temporal prelates declare for the King. The sixteen articles of Clarendon comprise in a formulated shape the sovereign rights of the feudal State. But in the course of the dispute passionate irritation loses him most of the advantages which had been gained. A thoughtless word of the King causes the murder of the Archbishop. Under the moral impression caused by this martyrdom, Henry II. is compelled in the year 1172, in the presence of the papal legates and a great assemblage of temporal and spiritual lords at Avranches, to purchase peace with the Church by taking an oath "to allow the appeals to the Pope *bona fide* from that time forward, and to remove all evil customs against the Church which had come into use during his reign."

The first century of the Norman period had almost brought into a condition of equilibrium the two powers which were struggling with each other. But after Henry II. the power of the Crown diminishes quite as continuously as the power of the Papal See rises, until the latter reaches its famous climax under Innocent III., whose rule is contemporary with the miserable reign of John. The humiliating submission of John, and his restoration to the throne as the vassal of the Pope, bring about the situation of Magna Charta (A.D. 1215). The material points of dispute which arise in this period are in a compressed sketch of their course as follows:—

I. The celibacy of the secular clergy. This, under William I., is at first only partially recognized, for the married clergy are still allowed to retain their wives (A.D. 1076). Henceforward, however, the ecclesiastical decrees are more strict. The canons touching celibacy increase in number. Those of the year 1107 contain a positive command directed to the married clergy to separate from their wives, and the rule that the sons of priests should never "inherit" the Church of their father. In the following year, however, Pope Pascal II. sends a letter of dispensation from the command of divorce, "because its execution in England would be very much out of place, seeing that there the best and greatest part of the

clergy is of that sort." In 1126, at a full ecclesiastical Council at Westminster (at which, for the first time, a papal legate presided), the legate, John of Crema, with great zeal pleaded for "*immaculata castitas*," but was himself obliged to leave the country in secrecy and haste, in consequence of an immoral scandal (Huntingdon, 219; Hoveden, 274; Knyghton, 2382). In 1192 it was thought possible to carry out the prohibition of marriage by leaving the enforcing of it to the King. But Henry I. made use of this power only by allowing every priest to keep his wife on payment of a fine. It was not until the twelfth century that the increasing power of Rome at last effectually enforced celibacy.

II. The dispute as to investiture broke out under William II. in consequence of the refusal of Archbishop Anselm, the King having up to that time enfeoffed his prelates with the ring and staff. At the council of 1095 even the bishops ranged themselves on the side of the ancient custom. But now, in consequence of this case, in the year 1098, a solemnly promulgated and severe canon was launched against investiture by laymen, and Henry I., by reason of his having usurped the throne, was not in a position to reject the mediation of the Pope on this question. In spite of the opposition of the secular vassals, the King acquiesced when Anselm consented to recall the sentence of excommunication passed on the prelates who had accepted a royal investiture. When at last the question was brought before a Council at London, to be decided on principle, the King ended the dispute by declaring on his personal and absolute authority "that in future no one shall be enfeoffed by the King or a lay patron of a bishop's see or an abbey by the delivery to him of a pastoral staff and a ring, but that, on the other hand, consecration should not be denied a chosen prelate by reason of the *homagium* which he pays to the King." Thus there arose a partition of the right of the investiture, which had been hitherto an exclusively royal prerogative. The compromise now places the election in the hands of the chapter, the consecration in the hands of the archbishop and bishops, the grant of the temporal goods and authority in the hands of the King. The election took place, from this time, at the chapter-house of the cathedral church, where the wishes of the King were communicated, either by letter or message (not, as formerly, by direct order). When the prelate elect had received the royal assent, the choice was scrutinized and confirmed by the metropolitan. Before or after the consecration, the bishop received from the King the temporalities, and took an oath of allegiance to him, corresponding to the *homagium* and fealty of a temporal lord (Stubbs, iii. 295, 296).

III. The appointment of the bishops by the King was such an undoubted, firmly established custom, that, in the first century of the period scarcely an objection was raised to it. Only in the election of the Primate of England the more exclusive character of the spiritual State made itself felt, an appeal being probably made to precedents; according to which, at the appointment of the head of the English Church, the chapter and the voice of the bishops had been heard. The elections of the archbishops Lanfranc, Anselm, and Radulfus (A.D. 1070–1121), proceeded still from the kings, who only afterwards consulted the prior and the convent as to their opinion. The violent dispute which began under Henry I., between the "monks" (canons), and the bishops, continued for a whole century. After the murder of Thomas Becket (A.D. 1170), a double election took place, which the Pope decided; and, after this precedent, he claimed the right of confirming all elections of bishops. The question of election was at last decided by Innocent III. in favour of the Canons of Canterbury against the bishops. In the course of the dispute the royal right more and more dwindled to a mere right of confirmation. At the close of the twelfth century, the rights of each party had become tolerably closely defined. The royal consent was indispensable; the right of the chapter to elect, and the confirmation of their choice by the archbishop, was formally recognized. The deciding authority of the Pope in disputed cases was upheld by strong precedents, but in the case of

disputed episcopal elections the Pope had only an appellate jurisdiction. Only in the case of an archbishop an immediate papal confirmation and recognition was carried out by the Curial theory of the Pallium (Stubbs, iii. 304). Before receiving the Pallium the archbishop may not consecrate any bishop; but on receiving it he has to swear obedience to the Pope in a form which, in process of time, becomes more and more stringent (Stubbs, iii. 297, 304). After free canonical election had been introduced by the charter of John, the royal right of confirming the election was also abolished. The royal influence after this time confined itself to the moral influence of the feudal oath, and to the fact that the King, by withholding the temporalities, could in any case enforce a renunciation of "all the clauses of the papal Bull, which should be opposed to the royal prerogative and the law of the land." It was not until the next period that a strong influence of the King upon the appointment of the bishops became indirectly re-established.

IV. The exclusiveness of the spiritual jurisdiction and its independence of the royal judicial jurisdiction, forms the most important point of the English Church controversy. Even Henry I. had on this point resolutely opposed the ecclesiastical claims. The appeal to Rome was only allowed under royal licence, and then only in cases which a royal court of law was incompetent to decide. Under Stephen, however, the exclusiveness of the episcopal jurisdiction over spiritual persons and matters was declared; and, after the system of appeal to the Roman chair had once begun under the legate, the Bishop of Winchester, in a few years it went so far that all the more important matters were referred to Rome for final decision. This state of things Henry II. found existing, and, in connection with it, a partially disordered clerical body, who, under the protection of their privileged judicial position, had in the course of ten years more than a hundred unpunished cases of manslaughter to show. In the face of these excesses, Henry II. was able to count on the acquiescence, not only of his Crown vassals, but also of the majority of the bishops.

At the commencement of the dispute with Thomas Becket, Henry had the sixteen articles of Clarendon drawn up by two of his justiciaries, Robert de Luci and Joscelin de Baliol, which articles, in fact, only contain the royal prerogatives so well defined by precedents, that in the assize of 1164 even the bishops recognized the royal rights. Thomas Becket sought in vain for a legal title for the new position of the Church; he was unable to find one, except in the authority of the Papal Chair. It was under these circumstances a decisive victory, when the King, at the Council of Northampton (17th Oct., 1164), brought about the condemnation of the Primate, and with it the recognition of the English custom. But, from that time forward Henry II. ruined his case by persecution and personal chicanery, which aroused the sympathies of the Saxon population for the archbishop. Against the murdered, and soon afterwards sainted Martyr, according to the spirit of the age, the King's case could no longer be victorious. In spite of all his shrewdness and perseverance, the principal object of the dispute was lost at the final conclusion of peace (A.D. 1174). The King allowed the appeals to the Pope, and in his acknowledgment made to the papal legate, Petroleone, limited the royal jurisdiction to actions brought on account of fiefs and hunting offences. In the struggle against his rebellious sons and against the sympathies of the Saxon population for the ecclesiastical cause, the King had grown old and weary. Under Richard and John, under the influence of the Crusades, and the manifold complications in the interior of the country, the papal power continued to advance until it reached the pinnacle of its might under Innocent III.

V. The recognition of the papal legates forms an important incident in the dispute as to the jurisdictions. Henry I. had for a long time set himself against their admission; but the complications which his resistance engendered compelled him to give way. Scarcely were the legates admitted, than, as early as 1126, a legate, as such, held a Church Council, and published seventeen canons, under the sole authority of the Pope. Under Stephen

their insolence rose so high as to summon the King to answer before a legate and Church Council. This might later be disavowed as extravagance. But the legate system had gained a footing; and the circumstance that archbishops of Canterbury had taken the position of legates, proved unfavourable to the independence of the English Church. The union of the powers of the legate with the office of archbishop, compelled the King to recognize indirectly the supreme jurisdiction of the Pope, so soon as it was placed in the hands of one of the archbishops. After Honorius III. (A.D. 1221), the archbishops appear to have received the regular commission of legates, as being "*legati nati*," from the moment of their recognition at Rome, and this was acceded to on the part of the Pope, with reservation of the right to send "*legati a latere*," who suspend the power of the "*legati residentes*." The legate system also reached its culminating point in the confusion under John.

VI. A further incident of importance was the exemption of the monasteries from the episcopal power. It began with the commencement of Henry II.'s reign, after which time the policy of the Papacy worked systematically towards weakening the episcopal authority. On the strength of an evil precedent, the richest abbeys, one after the other, were wrested from the bishops, and then actually subordinated to the Pope and his legates.

Another incident is the contest between the Archbishops of Canterbury and York for the primacy, which, in the vicissitudes of this century, fell to the Pope for final decision.

In these controversies the weapons employed by the two powers are characteristic of their respective positions. The King contends with the means he derives from his feudal, police, and financial supremacy, by withholding the temporalities, the sequestration of feudal possessions, the confiscation of personalty, the enforcement of amerciaments, and the application of the right of making decrees in individual cases. When the dispute was at its height, Henry II. caused all the personal estate and revenues of the archbishop, and of those of the clergy who declared for him, to be attached, and then further proceeded to confiscate the real estate, and to banish all the relations, household, and nearest friends of Thomas Becket, to the number of four hundred. In another case a royal decree imposes the penalty of death, or in the case of ecclesiastics castration, for the introduction into the country of any papal bull of excommunication. The power of the Crown shows itself as a rule to be so strong, that every order of banishment is effectual in its operation, and even the most powerful prelates withdraw themselves from the desperate conflict by flight. Under John all these means had become massed together and increased to an enormous extent. But this power is often checked by the feeling of the masses, by the threatening position of the French kingdom, which enters into the dispute as lord-suzerain and at the request of the Pope, by the danger which menaces the possessions of the English Sovereign upon the Continent, and by internal troubles,—under Henry II., even by a rebellion of his own sons. In the course of the ecclesiastical dispute matters went at last so far that the King found himself forsaken by his secular Crown vassals, as in the case of King John, and thus the Royal power reached its lowest limit. The Church on its side does battle by interdict and excommunication, with which at first the prelates and laity who pay obedience to the royal commands are threatened; then by degrees it increases in boldness and directs itself against the person of the King. A frivolous exercise of the spiritual instruments of combat could, however, be defied even by Stephen and John, so long as the feeling and the interest of the upper classes remained on the side of the Crown. The various phases of the dispute are complicated by schisms of the papacy, and, on the other side, by contentions as to the succession to the throne. The two sides may have been fairly balanced, but the decision depended finally on the internal energy of each.

VII. The final break-down of the royal ecclesiastical supremacy under John rests upon a concurrence of many circumstances, long since prepared in the person of the King. The impulse

was again given by the double election of an Archbishop of Canterbury. On the 21st December, 1206, Innocent III. had dictatorially, and in a very uncanonical fashion, imposed upon the Canons who had visited Rome as a special embassy, his friend and fellow-student, Stephen Langton, as archbishop. On the continued opposition of the King to this so-called election, there followed on the 24th March, 1208, the pronouncing of the interdict. The inhabitants of the country remained, however, passive; the temporal nobles were still on the side of the King. Three years later (A.D. 1211), the dispute had progressed so far that the legate pronounced the sentence of excommunication, released all subjects from their oath, and degraded the King from his royal dignity. The temporal vassals still adhered to the King. John, just at this time, had waged two fortunate campaigns, the only successful ones of his reign. It was the grievous fault of the King himself, that brought about the final crisis. Neither in England nor on the Continent had the affairs of the kingdom ever been carried on by such ferocious means as John made use of at this time; curiously combining the cruelties of an Asiatic despot with the practices of the Exchequer of Jews. In the following year (1212), a formal decree of deposition was issued by the Pope: "*Papa sententialiter definirit, ut rex Anglorum Johannes a solio regni deponeretur, et alius, Papa procurante, succederet qui dignior haberetur. Ad hujus quoque sententiæ executionem scripsit Dominus Papa potentissimo Regi Francorum Philippo, quatenus in remissionem omnium suorum peccaminum hunc laborem assumeret*" (Matthew Paris, 162). King Philip and the French nobility accepted the commission with enthusiasm, and war preparations commenced in France, which gave a prospect of a repetition of the events under William the Conqueror. The feudal summons of John on the other side, brought together in England an army of 60,000 men (Matthew Paris, 163), which had to be partly disbanded on account of the want of provisions. But, like an electric spark, a common consciousness of the unworthiness of this King flashed through the assembled masses. John himself felt this. Fear of the French military power, and of the temper of his own vassals determined him to unconditional submission. On the 13th May, 1213, the formal treaty with the papal legate, Pandulfus, was brought to a conclusion, in accordance with the papal instructions (Rymer, i. 2, p. 54). Two days later, on the 15th May, 1213, John resigned his crown and his kingdoms into the hands of the Pope, surrendering "to the Church and the Pope his kingdoms of England and Ireland, to receive them again from the Church as a feudal vassal" (Rymer, i. 2, p. 57; Matthew Paris, 164). Stephen Langton, Archbishop and Primate, makes his entry into England, takes possession of the Archbishop's see, and absolves the King from the sentence of excommunication. The negotiations as to the removal of the interdict and the compensation to the Church, are protracted for a considerable time longer, until the crisis ends in Magna Charta.

CHAPTER XVI.

The Curia Regis—The Great Officers of the Realm.

The Norman government of the kingdom rested upon a combination of the relations of the military, judicial, police, financial, and ecclesiastical authority; consequently its central point was found in the person of the King. The Norman feudal phraseology, which after the Conquest pervaded all departments, introduced for the above the appellation *Curia Regis*, which, corresponding to the social, military, judicial, and administrative position of the Crown, may signify according to the context:

The *Curia* considered as (1) the Norman Court Day; (2) the Royal Court of Justice; or (3) the whole Government of the realm.

I. **The Curia considered as the Norman Court Days.** The Conqueror was exceedingly fond of pomp and splendour. "Thrice a year he wore his crown, so often he was in England; at Easter he wore it at Winchester, at Whitsuntide at Westminster, and at Christmas at Gloucester; and there were gathered about him all the magnates throughout the whole of England—Archbishops and Bishops, Abbots and Earls, Thanes and Knights" (Chron. Sax. A.D. 1086). This account of the Saxon Chronicler, often varied by contemporaries, is the pith of all that we know about the *curia* in this sense. When the festivities were passed over, this was likewise chronicled: "*hoc anno corona sua non indutus est*" (Chron. Sax., A.D. 1111); similarly if he held his court at Christmas

only (A.D. 1114). Of course the pomp of the Norman court had increased greatly since the Conquest. We know that the Dukes of Normandy held a court three times a year, at Easter, Whitsuntide, and Christmas, and united with it exchequer and judicial business. These courts were accordingly, among the Normans, customary festivals, and were therefore called in England also, "*curiæ de more.*" They were to the subjects sometimes an occasion of pride and display, and at others, of national antipathy and painful remembrance of the past. The Conqueror evidently wished to accustom his subjects to the personal government of their "legitimate ruler." The oppressed Saxons saw here at first some few of their own race, and might have imagined the assembly to be the time-honoured Witenagemôte. Perhaps the summons to it was issued by royal writ, generally to the possessors of the same lordships and bishops' demesnes as in the Anglo-Saxon period (Chron. Sax., A.D. 1023). Many a proud Norman, with his princely retinue, would see in the assembly a Norman "*cour de baronie;*" but the Conqueror had taken care that it should be neither the one nor the other. The *curia* was rather, according to all authentic information, simply a court festival, the splendour of which was intended to compensate the greater feudal tenants for the want of political power and importance; as in later times under the French "*ancien regime.*" "The royal order," says William of Malmesbury, "summoned all magnates to the '*curia de more*,' that the emissaries of foreign nations should marvel at the splendour of this throng and the pomp of the festivals."

This phenomenon has, at first sight, something startling in it. William the Conqueror had passed from a dukedom with legislating diets, to a kingdom with a legislating Witenagemôte. In both countries powerful estates limited the royal power in important respects. But the Norman diets were not based upon written and traditional constitutional documents, but upon the usage of the law courts and upon the custom of the country. What the Norman Crown vassals found in England was not the customary law of their own

country; and the throng around the Norman Sovereign was to the Anglo-Saxon Thanes no longer their national assembly. The Anglo-Saxons no longer found a place in the council of the King, but only a tolerated existence in the position of under-vassals, which, under the system of the feudal social degrees, excluded them even from being *tenentes in capite*. For the Normans, in another direction, the precedents, upon which the old law of the Witenagemôte rested, were not "the rights inherited and liberties guaranteed from the days of their forefathers." To both nations had been promised the continuance of their hereditary common law; but from the thrusting together of two nations and two constitutions, there resulted a neutralizing of both, and the necessity of a renovation for each. As the old constitution was merely a combination of the relations in which the royal power stood to the landed interests in the army, law court, preservation of the peace, finance, and Church; so the new one could only form itself from the new relations; and these had in every department led inexorably to a method of government by royal ordinances, and to unlimited sovereign rights of the King. We will once again summarize these stages of development.

In the department of the military organization the personal summons of the King had taken the place of the decrees of the national assembly touching war and peace. Through the feudal system the old relation of personal service had become the only valid one; the feudal vassals do their service *intra et extra regnum* on the personal summons of the feudal lord.

In the department of the judicial system the Conqueror begins with the promise to allow the "*Leges Eduardi*" to continue. This was the concession, which even the mighty Emperor Charlemagne was obliged to make in fact and in law to the peoples of his empire, viz. the retention of their hereditary common law, which was to suffer no change through mere ordinances. William might indeed deliberate with his Norman nobles upon the promise he had made; but the "legitimate" successor of Eadward could not make the confirmation of the rights of his Saxon subjects dependent

upon their "consent." The same situation repeats itself whenever collisions between the laws of both nations occur, which for similar reasons must be decided by the King. From generation to generation the precedents accumulated, arising from this situation.

In the department of the preservation of the peace, the Conqueror commences his legislation with a decree which protects the lives of his Normans by a fine for murder of forty-six marks, against which the Normans were certainly not desirous, nor the Saxons able, to raise any objection. This situation repeated itself; the police-control naturally devolves upon the possessor of the absolute military and judicial powers.

In the financial department the King needed the acquiescence of the Normans with regard to the old revenues of the Anglo-Saxon kings as little as he required that of the Anglo-Saxons to the new feudal income. But the main point was, that the new revenue flowed in copiously, and that in the *auxilia*, *tallagia*, and *scutagia*, a new current income was periodically raised as need required, and one which sufficed for generations for all the King's necessities.

In the department of the Church, the Anglo-Saxon King had the right of appointing the prelates, and the right to give or withhold his consent to the resolutions of the Councils; the feudal constitution subjected the same persons to yet more extensive rights; the enforcement of military discipline, sequestration, and forfeiture of all real estates.

As all these legal relations conduced to an absolute rule, so the same result was brought about by sundry social conditions, arising from the dissension existing between the nationalities. These dissensions, from the lower strata upward, pervaded and loosened the bonds of society in the counties, and consequently deprived the great vassals of the support of those below them. There were certainly about the same number of great landlords as in the Anglo-Saxon times, outwardly more brilliant and pretentious; but without the internal union among themselves which is the root of political power and liberty. There was the most splendid court in

Christendom, at which, in a long and brilliant cavalcade, the rich Norman lords and prelates appeared from time to time, followed by their under-vassals and retinues, with the colours and distinctive badges of their lords. There were the same elements of possession upon which in former days was based the Witenagemôte that had degraded Eadward's authority to a shadowy rule. In spite of all this, the Norman kings rule the land by means of writs and letters of privilege, they appoint or depose year after year their bailiffs in the counties, and assemble their tenants and prelates at parades and court festivals without allowing them any influence but that derived from revocable offices and commissions. The Norman grandees lacked the support which was the life of the dynasties on the Continent; because their estates were scattered and severed, and their men divided by national antipathies. Their Norman under-vassals are at first persons hastily collected, their Saxon under-vassals yield reluctant service to a lord who has been forced upon them, and the Saxon population, as a whole, retains for generations its dislike to the whole body of the intruders. The conjunction of these relations brought about irresistibly the decomposition of the older political rights, although these had a deep historical foundation. (1)

(1) The Norman Court-days have been the subject of a party controversy from different points of view. In the time of the Stuarts it became important to oppose the highly exalted right of the kingship "*jure divino*" by an at least equally ancient genealogical tree of parliament. The indefinite testimony given by historians, severed from its connection, was accordingly rearranged in such a way that the words "*curia*," "*concilium*," and "*consilium*," were made to mean "legislative and tax-granting national assemblies."

These "armed parliaments," with their gleaming helmets, shields, and martial parades, were also an object of interest to the students of heraldry. It is part of the special business of the herald's office to find for a newly created lord, some remote ancestor, who was perhaps an under-vassal, or, in a fortunate case, a petty Crown vassal with a few hides of land, but who, in the spirit of heraldry, must have been a "lord, hereditary noble, and councillor of the Crown," in order to figure as an ancestor of equal rank at the top of the pedigree. Just as interested are our political parties of to-day in setting up an old pedigree for parliament. A view, very widely propagated at the time of the Reform Bill, represented the Norman crown as perfectly dependent on parliament. This line is taken by Allen's treatise, which was received with great approbation (*Edinburgh Review*, vol. 35): "The name, and probably also the constitution of the Anglo-Saxon national assembly, was changed at the coming of the Normans; but its functions remained the same, and continue so in our parliament of to-day."

The idea put forward by antiquaries

The documentary history is in harmony with this. There exist actually no laws of this period which have proceeded from the initiative and the free deliberation of estates of the realm. The formula found in one or two cases, "*consilio et consensu baronum meorum*," will be referred to later, and apart from this. The so-called laws of William I. are really proclamations, charters, and official commands, as is seen at once in the style, "*præcipio*," "*prohibeo*"—the King wills, orders, decrees. Even if sometimes a plural occurs, a "*statuimus*," "*voluimus*," "*præcipimus*," we cannot infer from this the action of a deliberative assembly. Under William II. also, such decrees do not occur; he does not even appear to have summoned an assembly to ratify his doubtful claim to the crown. Henry I. certainly begins his reign with a charter in which he promises much, the pith of which lies in these words: "I give you again the laws of my father; that is, the laws of Eadward, with the changes which my father

of a feudal Estate of the Crown vassals, overlooks, in the first place, the social disparity between half a thousand petty Crown vassals and the princely earls and great lords, whom William had enfeoffed as *tenentes in capite*. The great political fact is further overlooked that the dependence of the King upon the majority of his Norman vassals would have brought about the most rigorous decrees against the rights of the Saxon population, which still formed a great portion of the feudal army, the numerical majority in the staff of the Church, and the greater part of the whole population of the nation. So long as dissensions continued between the "Francigenæ" and the "Angli," the carrying out of the promises made to the Anglo-Saxon portion of the community could not possibly take place under a legislative assembly of Normans. In consequence of this arbitrative position, no monarch since Charlemagne, was ever so favourably situated as the Conqueror for thoroughly organizing his empire on a uniform system. William I., and both his sons, show a practical understanding and an inexorable persisteney in dealing with this question, such as are rarely found in history in conjunction with so many favourable circumstances. Once set on foot, this system of government strengthened and developed its maxims through the medium of its professional officers. The old custom of Normandy was indeed considered, but was never the decisive element where royal powers and financial interests were concerned. The Norman *Echiquier* certainly combined the court assemblies with business. After the festivities were over, it was the custom to proceed to the account table and bring in order what was owing to the lord. But in England a regular connection is not perceptible. The Exchequer is from the first a fixed official body with its own course of business procedure; its two principal Terms do not tally with the period of the court days, and a summons of those from whom accounts were due to the court festival was never dreamt of. In the same manner the four law Terms of the English courts of law do not tally with the periods of the *curia de more*, and this is external evidence that the later course of judicial business did not proceed from the Norman court days.

has made with the consent of the vassals," wherein the one-sided character of the proclamation is distinctly prominent. Under Stephen a similar charter was issued, and nothing more. Under Henry II. the Assizes of Clarendon and Northampton contain the first beginnings of a legislation with assemblies of notables, but these tokens again disappear. Under Richard I. and John we find again only instructions to officials as to their duty, and charters. The careful investigation made by the recent committee of the Upper House upon the subject of the peerage, has led to the definite conclusion that under William I. and William II. nothing can be discovered to show the existence and constitution of a legislative assembly; but that the charters of Henry I., Stephen, and Henry II., showed that the promise of the continuance of the laws of Eadward had been regarded as the "right of the country;" and that it might be thence concluded that there existed a sort of legal constitution, of which a legislative assembly gathered together at least for certain purposes, formed a portion; and that special one-sided arbitrary imposts were regarded as infringements of the rights of the subject (Peers' Report, i. 36, 42). The chief question, how such an assembly was composed and limited, as well as the question touching the revocability or irrevocability of the royal charters and letters of grace, is not here dealt with. But the really important part of that view lies probably in this point, that even the Conquest was neither desirous nor able to abolish the highest principle of all Teutonic constitutions, viz. that the *lex terræ* cannot be altered by despotic command, but only with the consent of the representatives of the nation; "*lex ex consensu populi fit et consensu et constitutione regis*" (edit. Pistense, sec. 6), "*ut neque principes nec alii quilibet constitutiones vel nova jura facere possint, nisi meliorum et majorum terræ consensus primitus habeatur*" (Reichstag at Worms, 1231).

In times of necessity and peril the Conqueror also was obliged to pay regard to this national feeling, which can be clearly traced throughout our thousand years of German history. When he cut most deeply into the existing "law of

the land" by the separation of the spiritual from the temporal courts of law, and by their subordination to the "*canones et leges episcopales*," he added, out of respect for the nation and the Church, that this was done "*communi concilio episcoporum et abbatum et omnium principum regni.*" This absolute sovereign will certainly did not exclude the idea that the *optimates*, who were assembled at the court day, should be heard and their opinion asked in important enactments. Naturally this was done in the case of measures affecting the whole of the common law, as for example the decree in 4 William I., which confirms and modifies the laws of Eadward the Confessor. In the charter which held out so many promises at the commencement of his reign, Henry I. declares, in this spirit, that those additions were made by his father "*consensu baronum.*" But the purely deliberative character of the estates of the realm is also seen in the formula. In the sole existing political act, in which William the Conqueror speaks of the "*consensus episcoporum et principum*," he confines himself to inserting this assurance into the decrees which he issues to his magistrates. In like manner Henry I. in his charta confines himself to the assurance that the "*emendationes legum Eduardi*" were made "*consensu baronum.*" For more than a century the many hundred signatures of the prelates and magnates disappeared, by which in the Anglo-Saxon times the resolutions of the realm were confirmed and attested. No one has the right to inquire who was summoned to such a *consilium*, no one has a right to attest such resolutions. The declaration made by absolute royal authority, that the "*meliores terræ*" were present, is regarded as sufficient in form and fact. Promises that the magnates should give their consent, and guarantees for these promises, begin only after Magna Charta. On the appointment of high prelates the whole of the assembled notables are also heard in council; when contemporary accounts allude to the business of the *curia de more*, this is their ordinary topic; but yet this only signifies that the King appoints the prelates after hearing the "pro" and the "con." For in-

stance, Stephen at Easter 1136, holds a *generale consilium* in the presence of eighteen bishops, and a like number of secular lords, and issues a charter for the appointment of the Bishop of Bath: "*audientibus et collaudantibus omnibus fidelibus meis his subscriptis.*" Upon a new accession to the throne, or at the knighting of the eldest son, an especially brilliant company probably assembled, which might be described as an extraordinary court day. Such a one was that of 1086, which William I. summoned towards the close of his reign, for the purpose of reviewing the feudal militia and receiving the feudal oath from the vassals. Such deliberative estates could certainly by a mere change in their degrees of power again become legislating bodies. But even for this the external form was wanting from the time when the Norman kings, perhaps from fear of such a result, began to discontinue the periodical court day. Already under Henry I., the *curia de more* was no longer regularly held. During the grievous confusion in Stephen's reign it completely ceased: "*Jam quippe curiæ solemnes et ornatus Regii scematis ab antiqua serie descendens prorsus evanuerant*" (Huntingdon and Chron. Norm., A.D. 1139). They never revived in the old periodical manner. For the deliberations of the king with his *optimates* a body had therefore to be formed in a new fashion, and one which could attach itself to the administrative system and the existing grand offices. The constitutional rights of the English parliaments have in the course of centuries been so legitimately and honourably acquired, that they do not need any invented pedigree.*

* A combination of State business with the great festival gatherings certainly resulted from the nature of the State, and is also occasionally expressly mentioned. "*Peractis igitur festivioribus diebus, diversorum negociorum causæ in medium duci ex more coeperunt*" (Eadmer, pp. 37, 39, 102). But we find all such mentions confined to the fact, that the nobles, assembled at the court, were asked their opinion, war or church matters were discussed with them, and judicial commissions appointed from their numbers; but of a constitutional right of assent to acts of legislation there is nowhere a trace. On the occasion of the accession of a king, and at his coronation, a form of election or acclamation was retained, and continued as a very ancient ceremony, but it had certainly no greater significance at this period than in the Anglo-Saxon (Eadmer, p. 31). The remaining instances of an association of State business with the court days are principally the following: A.D.

II. **The Curia Regis as a Constitutional Central Court of Law** would naturally have combined with a Norman parliament, if such an institution had existed, after the fashion of the Anglo-Saxon Witenagemôte. The function of a court of law was and remained the very kernel of every Germanic form of constitution; judicial proceedings formed the current

1070, when the subjection of ecclesiastical property to the feudal burdens was decided upon (Matthew Paris, A.D. 1070, whose statement, however, is for good reasons called in question by Stubbs); in the same year the hearing of a lawsuit between the Archbishop of York, and the Bishop of Worcester occurs; A.D. 1096, the hearing of a duel accusation brought by Geoffrey Bainard against William Count of Eu; A.D. 1106, proceedings relating to the reunion of Normandy; A.D. 1107, for the regulation of ecclesiastical disputes; A.D. 1123, for the appointment of the primate; (A.D. 1124, a "witenagemôte" at which forty-four thieves were hanged, was certainly not a court assembly, but an extraordinary legal assize); A.D. 1136, under Stephen, for the ratification of the election of the Bishop of Bath: the charter drawn up on this matter concludes with the words: "*audientibus et collaudantibus omnibus fidelibus meis his subscriptis, apud Westmonasterium in generalis concilii celebratione et Paschalis festi solennitate hoc actum est*," etc.: there were present thirteen English and five Norman prelates, the chancellor, three earls, two constables, four court officers, and six barons; A.D. 1155, at the proclamation of the two sons of Henry II. as successors to the throne; A.D. 1164, the extraordinary Assizes of Clarendon and Northampton are special gatherings of notables, in consequence of the peculiar state of the ecclesiastical controversy. The older polemic treatises, such as Petyt's "Rights of the Commons Asserted," Brady's Tracts, etc., treat all such *concilia* as legislative Norman parliaments. In modern times the "Edinburgh Review" has repeatedly recurred to this view. Hallam, on the other hand, is somewhat reserved, "Middle Ages," Note X. In the "Peers' Report on the dignity of a Peer," the question is treated with critical caution and legal perspicuity. An authentic digest of all the notices of *concilia*, from the Conquest to Magna Charta, is given by Parry, "The Parliament and Councils of England," London, 1849, pp. 1–23, in which the uncertainty and informality of these assemblies and deliberations is made perfectly clear. The most recent historian, Bishop W. Stubbs, treats of the Assizes, i. 356–378, 369, 376, repeatedly both in his "Constitutional History," and in his "Select Charters." But whilst in one passage he confesses to the purely "nominal" character of this co-operation, in which only the theory and form of a national assembly are retained in memory of an old Germanic political idea (Hist., i. 356, Charters, 17), in other passages the traditional ideas as to the Norman parliaments are repeated without material alteration (Hist., i. 276, Charters, ii. 23, and in other places). Against the direct evidence that in the Norman period the royal right of decreeing exhaustively controlled all departments of the Government, a constitutional lawyer, like the author of the great Upper House Reports on the Peerage, might perhaps endeavour to bring counter evidence. But the mere repetition of the traditional assertions cannot be received as a counter proof. Still less is the question suited to elaborate discussions in essays and in the daily press, even though they be received with never so much "approbation." An accurate history of the Anglo-Norman period is impossible, if all the rights which, laboriously advancing step by step, have been acquired for the popular representation, are by a fiction presupposed as already existing.

business of every national assembly. An object for this judicial activity existed beyond doubt, for the "Leges Eduardi" comprehended the old jurisdiction of the "King in the Witenagemôte" in cases of a *defectus justiciæ*, of denial of justice, and of a claim for justice against overpowerful persons. This department was now even extended by the reservation of royal jurisdiction over Crown fiefs, and by further reservations in civil and criminal causes. But the traditional mode of holding a King's court in the Witenagemôte had become inapplicable. The Norman lords, whom the King now gathered about him, might represent many things; but they were not the "Witan of the country," the highest bearers and depositaries of the Anglo-Saxon common law. For all the highest decisions according to the "Leges Eduardi," they were altogether incompetent. The King could not declare any body of Norman lords a permanent central court of law without proclaiming a *jus iniquum* as a principle for the country. Equally inapplicable was the kind of court customary on French soil. Had it been possible to constitute a great princely feudal court, like those which sprang up in France around the great ducal families, this would certainly have been to the interest of the Crown vassals; for out of such a "*cour de baronie*" a political body of great importance would have immediately arisen, of whose enactments the history of this period would have had much to narrate. But the Crown vassals, more than five hundred in number, were entirely unsuited for such a purpose. The Norman Eorls and great vassals, in their almost princely position, would never have thought of regarding a few hundreds of Norman horsemen and upstarts as their equals simply because, by holding a single estate, these men had become *tenentes in capite*, or immediate soldiers of the King. Even in the thirteenth century the creation of such a "peerage" utterly failed. Such an informal body would have lacked also the necessary legal qualities; for the judicial decisions involved not simply feudal customs, but also most difficult questions of the old common law, as well as still more difficult and conflicting

questions arising between the "Leges Eduardi" and the existing feudal law.

For obtaining proper legal decisions, there was accordingly nothing left but a small selection of lawmen. Among the numerous spiritual and temporal vassals a number of suitable and experienced men might be found, to deal with each individual case. Among more than five hundred vassals, who were, according to the right inherent in the grants of land, certainly in form *pares* among themselves, the selection of lawmen took of itself the shape of a commission for individual causes. The royal appointment moreover clothed even minor vassals with the requisite authority. The great vassal was obliged to recognize each man so appointed as a *judge*, even though socially he would never have recognized him as his equal. In truth, the position of the great feudatories among several hundred petty ones was not by any means pleasant, and hence it can be explained why the great lords preferred submitting themselves to the judgment of the King rather than to that of a miscellaneous commission, which never inspires confidence in its administration of justice. Of so little practical value was this "*judicium parium*" acting by commission, that in later times Magna Charta in its 39th article mentions the "*judicium parium*" of the "*liberi homines*," but no especial "*judicium parium*" of the Crown vassals. To this was added the fact, that the great Norman lords found small pleasure in occupying themselves with legal questions, when such questions did not concern their native law and their feudal customs, but only the local, and legal business of a foreign place. Hence most of them probably preferred the military pomp of the court days to magisterial duties; to many of the lords the new order of things was so distasteful that they gave up their fair possessions on English soil and returned to the Continent. Still less had the kings an interest in constituting formal judicial assemblies from the vassals at court. For two whole centuries they systematically strove against the creation of great feudal *curiæ* in the counties, until they attained their object in the

statute of Marlebridge by forbidding every appeal to the greater feudal *curiæ*. For political reasons, they could still less tolerate the creation of a central "*cour de baronie*." They much preferred to leave to a pliable administrative justice all decisions, which, in one form or other, could be properly referred to it. Where the immediate royal right to property, or a *debitum regis*, was concerned, the Exchequer decided with more certainty for the interest of the King; and since the "*sedentes ad scaccariam*" were also Crown vassals, and also tried cases in judicial form, and were likewise justices as well versed in the law as the members of a specially constituted judicial commission, the position of the Exchequer, as a "*judicium parium*," could not formally be called in question. The official title, "*barones scaccarii*" was perhaps originally chosen to express this qualification of its members to pass judgment upon the Crown vassals. Where the financial system was not concerned, it was in other respects much more convenient to assign the Crown cases reserved to the county courts; besides, in the earlier generations it was not possible to dispense with the co-operation of the county courts, where local affairs and Saxon customary laws were concerned. The *Vicecomes* presides over the trial by a royal writ with his lawmen in the ordinary manner, but only in virtue of a special commission: "*hæc dominica placita regis non pertinent Vicecomitibus sine diffinitis prælocutionibus in firma sua*" (Hen. I. 10, c. 3). It was not until the time of Henry II. that, together with the system of itinerant judges, the general centralization of royal justice in the staff of the judges took its rise. (2)

(2) A supreme feudal court was also necessary in England, since the Crown vassal can claim to be judged only by his *pares*. The under vassal can never sit in judgment upon his own feudal lord (Hen. I. c. 32). But if on the Continent a standing, or at least a periodical feudal court arose out of this right, this was only in consequence of the different territorial institutions which existed there. In England the *judicium parium* became established in consequence of the scattering of the great feudal possessions throughout several counties, so that every Crown vassal found his *pares* in his own county, and also a royal *Vicecomes* or commissioner among the vassals of the Crown as the representative of the King. According to this arrangement, the county court was the regular forum of the Crown vassals, and so the personal suit of court owed by all temporal and spiritual

With these views the historical evidence also tallies. We find the royal judicial control only exercised in the form of commissions, and then only in those comparatively few cases where actions were brought by the most powerful and favoured vassals of the Crown. In all cases of which we have record these commissions are of such a temporary character in respect of their personal composition, form, and principles, that the idea of a permanent court of justice of Norman peers would never have arisen from historical testimony, if it had not been thought necessary to interpolate the missing pieces of evidence from institutions of the Continent and of later centuries. Under William I. a dispute between the Bishop of Rochester and a sheriff was referred to the county court for decision, the Bishop of Bayeux presiding on the occasion. The decision of a suit of the Archbishop of Canterbury on a matter of deprivation of lands, was delegated to a court composed, under the presidency of the Bishop of Coutances, of several bishops, Crown vassals, the sheriff, the "whole county" of Kent, and notable persons of other counties. Under Henry I. the Bishop of London receives a royal command, to allow the Abbot of Westminster his right, "otherwise the Exchequer will pass judgment." William I. arrests,

vassals of the Crown was strictly insisted upon (Hen. I. c. 7, sec. 2). The great majority of their law-suits continued for a long time to be in reality settled in the county court. The records of the proceedings at law recorded by Palgrave, vol. ii., show us that, in addition to these, special judicial commissions were comparatively rare: the admission of them, side by side with an established feudal court, would be perfectly inexplicable. Just as incompatible with a fixed and stationary "*cour de baronie*" would be the judicial jurisdiction of the Exchequer, the structure of the whole administrative law, the police system of arbitrary amerciaments, and all the later incidents, from which a court of peers hardly succeeds in emerging with endless difficulty and fluctuations in the course of centuries. It is true that this condition of a supreme central jurisdiction wielded by commissions and the Exchequer exhibits a bad judicial system, which together with the dismembered form of the county courts affords an evil picture of the whole. But this picture truly represents the state of affairs, which only becomes less gloomy after Magna Charta. The judicial administration was, and continued to be, the weakest part of the Norman government, in which the formal retention of the "Leges Eduardi" was incapable of remedying internal injuries, the unreliability of the constitution of the courts, and the mercenary spirit of the whole system. The Norman, at all events, found in the greedy Exchequer, and in the fee-exacting district governor, his countryman, his comrade, and his compeer. But how stood it with the less fortunate Saxon Thane and Ceorl?

at a court day, even his own half-brother without a judicial proceeding. In like manner, in 1137, Stephen arrests his nephew Roger, the chancellor, and two bishops, "*et commisit eos custodiis, donec dederent castella.*" Reserving a final sentence pronounced by judicial peers, the King thus decides extraordinary cases either in person, or by writ, or by a judicial commission delegated for the purpose. Under Henry I. high prelates travel across the seas, to lay litigated cases before the King, and decisions which the King pronounces in Normandy by writs *de ultra mare*, are still quite usual under Henry II. and Richard I. For the course of business of the royal judicial commissions the documents reprinted in Palgrave, vol. ii., are so far of importance that they testify to very informal proceedings taken by the commission, which would be inconceivable if at the King's court a feudal tribunal with permanent officials had existed as an established, or at least a periodical court of law, which like every feudal *curia* would have formed for itself a fixed and formal procedure.**

** As evidence how on the other hand "Constitutional History" regards the formation of the *aula regis* or *curia regis*, I content myself with referring to the following authorities: Bowyer, "Constitutional Law," p. 243, and Millar, "English Constitution," vol. ii. cap. 3. "The administration of justice in the final instance, belonged originally to the great council. It was the King's baronial court and his *tenentes in capite* who were the *justices* and judges" (Allen, in the *Edinburgh Review*, xxvi. p. 364). "The committee of the Upper House confines itself to accepting an *ordinarium concilium* of the King, which consisted of the great officials and a smaller number of prelates, barons, and *justiciarii* learned in the law. This select council was at the same time the supreme court, called *Curia Regis*, which generally met three times a year—at Easter, Whitsuntide, and Christmas" (Peers' Report, p. 20). This confusion is due to the fact that later, under Henry II., a body of official *justiciarii* was formed, and that consequently the later legal works of Glanvill and Bracton, treat of the *curia regis* in the form of a permanent body. These official judges are erroneously represented as the immediate successors of the great barons in Norman feudal *curia*. As a proof that such a permanent tribunal of peers had after the Conquest really become formed, fragments of the feudal constitutions obtaining on the Continent are quoted. But what became of this powerful permanent body afterwards? The so-called history of English law offers no explanation (Parry, "Parliaments," p. xii), (Foss, "Judges," i. 20). Whether it was from the feeling of their incapacity in the face of the science of jurisprudence that was now beginning to arise, or whether it was from increase of business in the court, we are told that at all events "the great barons gradually withdrew." Whilst the later barons of the fourteenth and fifteenth centuries seek to gain their political influence by personally taking into their hands, and that with the most unexampled zeal, the conduct of political and judicial business, by which they finally acquire the privileges of

The negative result accordingly is this, that under the name "*curia regis*" there existed a wide judicial authority, residing in the King, of personally appointing and constituting the court in numerous important cases; but that this *curia regis* did not consist of the collective body of all vassals of the Crown, who in their present form constituted no exclusive body; nor of a definite number of great vassals, for at that time there was no precedent for a legal separation of the greater from the lesser vassals; nor of a definite number of great officers of the realm, for the great offices were at that time not so constituted that it was possible to form on their basis a permanent court of peers.

In this connection it becomes clear how in England the judicial supremacy of the King could extend and become centralized so far beyond all the limits of the Germanic constitutions of the Middle Ages; how, contrary to all principles of the Germanic *ordo judiciorum*, the King so often sits in person in court, and personally takes part in giving judgment; how the forms of a rescript procedure by writ arise, and even direct justice by means of rescripts; how for centuries afterwards the highly personal character of the court-tribunal is retained in the Constitution, as that of a tribunal, "*ubicunque fuerimus in Anglia.*" Hence can be explained how Bracton, Fleta, and the later law books do not regard the royal office in the strict formal sense of *holding* the court, but as a duty of administering justice itself: "*nec potest aliquis judicare in temporalibus, nisi solus rex vel subdelegatus* (Fleta, i. c. 17, sec. 1). From this justice which is concentrated in the person of the King, there arises at a later period under Henry II. a court of justice composed of official judges, which, as the records inform us, arose in quite a different way, and not as a continuation of a permanent court of peers.***

a court of peers, the barons of the twelfth and thirteenth centuries are declared to have begun their political career, by withdrawing from the tribunals!

*** The only correct element in that fanciful image of an *aula regis* is limited to this: that the hearing by commission of the Crown cases reserved the method of procedure by

III. **A Curia Regis considered as a Supreme Government Council,** in which the central conduct of all the State business is comprised, would have developed itself, as in France, from a permanent feudal Court of Law, had such an institution really existed in England. But since the court days of the King are assemblages of pomp, since the royal judicial power is exercised by commissions, the very elements of a formal royal council of the realm were wanting. Granted, that the person and the dignity of the monarch, even in the court festivals, can never be entirely separated from the cares and business of Government;—still a continuous deliberation of the king was also indispensable, apart from the court days, owing to the intricate legal business of a kingdom constituted like England. Hence there existed beyond all doubt from the first, a *Consilium Regis*, only not in the sense of a fixed body, determined by property or office; but simply in the sense that the king had at his side a small number of chosen spiritual and temporal vassals to deliberate with him; a *consilium*, whose constitution and method of proceeding was still somewhat indefinite, and varied exceedingly according to the character of the King. There existed at every given point of time a sort of *conseil du roi*, which the feudal language designated as the *Curia Regis*, but which varied every day according to the will of the king, as according to the letter of the law is also the case with the Privy Council of our own day. (3)

writs, and the ordinary administration of the sheriff's office by temporal vassals of the Crown gave rise to a narrower circle of prelates and barons, learned in the law, who were generally employed in judicial business. A body of persons like this was the natural forerunner of the *justiciarii* of later times, and of the "bench" of justiciaries, afterwards formed. Madox (i. 6) is, as usual, nearest to the truth; he always quotes soberly from the Exchequer records.

(3) The *curia regis*, in the sense of the supreme council, can be just as little traced back to a corporate body, as can the supreme feudal tribunal. It was first of all the minority of Henry III. that rendered it necessary to create a formal *consilium regis* as a council-regency, consisting of prelates, vassals, and persons learned in the law. The Permanent Council that was afterwards formed on this precedent, give rise to an erroneous idea of a permanent council as a constitutional department during this period. Here, too, it is difficult to meet such deeply rooted political convictions, otherwise than by giving the following survey of the great offices which actually existed, and which were composed of a haphazard collection of temporary representatives, and court and feudal offices.

That this view is correct is convincingly shown also by an examination into the nature of the great offices, which in their Norman form could as little constitute a permanent council as a permanent court of law. Seven great offices are mentioned; but they partly lack a permanent character, and are partly limited to very definite and particular business.

1. **A Justiciarius totius Angliæ** occurs at an early period, but only as the King's representative, appointed by commission for a time, and frequently together with others. For a long time, too, there is no fixed appellation for such a general governor, for whom, according to the taste and style of the writer, sometimes one and sometimes another Latin expression is used. The frequent absence of the kings in Normandy made a representative often necessary. But it was not until Henry the Second's reign that R. de Beaumont, and then R. de Luci, and in 1180 R. de Glanville, were definitely described as "*Summus Justiciarius totius Angliæ.*" Richard I. at his accession appoints a bishop and an earl, and associates with them (*associat eis in regimine*) five barons. Subsequently, on his departure into Normandy, he appoints two other bishops and four barons; from Palestine he adds to these the Archbishop of Rouen. Later, Archbishop Hubert becomes *Summus Justiciarius*. The patent still exists (15 John) which appointed the Bishop of Winchester "*Justiciarius noster Angliæ, quamdiu nobis placuerit, ad custodiendam loco nostro terram Angliæ.*" It was not until the time of Henry II. that the office appears to have been regarded as a Government office; after Henry III. it ceased to exist. (*a*)

(*a*) The *Capitalis Justiciarius* is so treated by Spelman (pp. 405–418) that a certain continuity in the office appears to be proved by what he says. But under the earliest reigns, only a temporary representation of the King is spoken of. In the year 1067 William I. appoints Bishop Odo and W. FitzOsbern, *custodes Angliæ* (Hoveden, i. 450). The Saxon Chronicle says of Odo "*Cum rex in Normannia, fuit ille primus in hac terra.*" In 1073 W. de Warenne and R. de Benefacta are denoted as "*Vicarii Regis*," or "*Præcipui Angliæ Justiciarii.*" Under William II., Flambard, a chaplain of the King, is mentioned as "*Placitator et Exactor totius Angliæ*," or "*Regiarum opum Procurator et Justiciarius.*" Under Henry I. Bishop Roger is called "*Justiciarius totius Angliæ et Secundus a Rege.*" Under the same king R. Basset and others are also mentioned in a like capacity. In 1153 Stephen appoints his successor by agreement, "*Justiciarius Angliæ*,"

2. **The Seneschallus totius Angliæ, Lord High Steward,** *major-domus*, appears to have been from the first an hereditary office. The Norman kings were the richest lords in Christendom, and their social position in itself demanded that they should be surrounded with court offices; some of which, according to the ideas of that period, were required to be quite as hereditary as the Crown which they served. A seneschal, a marshal, a chamberlain, a butler, were all the more necessary to the royal Crown and dignity, as the great vassals were themselves surrounded by similar officers. Beyond doubt an hereditary major-domus had previously existed in Normandy. But the office was of such little political importance, that the seneschal of William I. cannot be identified. Under William II. it is said of Eudo "*major-domus regiæ, quem nos vulgariter Senescallum vel Dapiferum vocamus;*" and an old record quoted in Coke testifies: "*Senescalcia Angliæ pertinet ad comitivam de Leicester et pertinuit ab antiquo.*" On the condemnation of Simon de Montfort at the close of this period this hereditary office became extinct. (*b*)

3. **The Lord Great Chamberlain.** The royal household had from the earliest times a separate administration (*Camera*) for certain estates, dues, payments in kind, and personal expenses of the King. The managers (*camerarii*) are personal officers of the King, but the place of the first among them

—at least Hoveden asserts this, although the agreement that had been concluded contains nothing about it (Foss, i. 145). A good survey of these early general governorships is to be found in Foss, i. pp. 11–20 *et seq.* The important circumstance is also brought into prominence, that those persons whom the historians mention as *summi justiciarii*, sign the charters as witnesses, without adding this title (Foss, i. 85); and also, that the title *justiciarius* actually never occurs in the charters of William I., and very rarely in those of William II. (Foss, i. 90). But under Henry II., together with the radical changes introduced into the central government, the *summus justiciarius* appears unmistakably as a formal governmental office (Foss, i. 169). The order from that time onwards is given by Foss, i. p. 170, *seq.*, ii. p. 23, *seq.*

(*b*) With regard to the *seneschallus totius Angliæ*, *cf.* the references in Madox. Grentismenill is mentioned as seneschal of William I., but in different places other persons. After the extinction of the office in the person of Simon de Montfort, it came later by re-grants to the house of Lancaster, became extinct with the accession of that house to the throne, and was subsequently only granted on the occasion of great ceremonies, *pro hac vice*, notably at coronation festivals. A detailed description of the royal household under Henry II. is to be found in the Liber Niger Scaccarii (edit. Hearne).

(*magister camerarius*) becomes in accordance with the tendency of all court offices, an hereditary office. Thus Henry I. grants to Alfred de Vere "*Magistram Camerariam totius Angliæ in feodo hereditario tenendam;*" and so it remained down to the time of Henry de Vere, eighteenth earl of Oxford. But since the hereditary office becomes, as usual, a mere honorary place, there arises for the real administration of the *camera*, a new personal office of *camerarius regis*, King's chamberlain, who has also a place of honour in the Exchequer, in which his and the Lord Great Chamberlain's under chamberlains, or chamberlains of the Exchequer, are employed as keepers of the chest. Under the Plantagenets this King's chamberlain becomes an active Lord Chamberlain. (*c*)

4. **The Constabularius totius Angliæ, Lord High Constable,** *Connetable* of England, cannot be shown to have been an hereditary office in the earlier Norman reigns. In Normandy it appears to have existed; in England the creation of such an office was against all the principles of the Government. *Constabularii* are, it is true, mentioned often enough; for every command forms a "*constabularia*," the command of a troop, a castle, a garrison, or even of a ship (*constabularia navigii regis*). It was not until the time of the concessions in Stephen's time, that a *constabularia* appears as a family office, and under Henry II., one or two *constabulariæ* are beyond all doubt bound up with the possession of a group of knights' fees. But the privileges attached to the office appear to have been only two:

(*a*) A post of honour as Great Constable of the feudal militia on its peace footing, with no right to command, but some military jurisdiction, and with the duty of keeping the rolls of attendance and similar administrative functions, which were performed by representatives. Real commands are always based upon royal commission.

(*c*) As to the Great Chamberlain and the Camerarii, *cf.* the references in Madox. After the death of Henry de Vere, eighteenth earl of Oxford, the hereditary office became divided owing to female succession; it exists to the present day with certain fees and functions at the royal coronation.

(β) A place of honour in the Exchequer with formal duties exercised by representatives. Thus the *constabularia* arises in the Exchequer, and in the Court of Common Pleas also, after their separation. But the constable is only an active member of the Exchequer by virtue of special appointment.

In this sense the Bohuns held the hereditary office until 1371; then it passed through female succession into the royal family; and thence to the Stafford family, in which it became extinct in 1521. (*d*)

5. **The Marescallus Angliæ.** An hereditary military marshal no more existed originally in England, than an hereditary constable. The conquering army, it is true, had its marshal (R. de Montgomery). But the idea of a family office is not met with until Stephen's time, when (together with Milo of Gloucester as high constable) Gilbert de Clare is mentioned as marshal, and the office is continued from that time to his descendants. On the other hand it appears that from the first an hereditary royal marshal's office had existed; an office, which, considering the importance of the royal stables, could hardly be omitted in a court household, according to the social notions of those times. The title is certainly very indefinite. Every office for the management or provisioning of a number of horses is called a "*marescalcia*," and we even meet with a *marescalcia avium* and a *marescalcia mensuræ regis*. Beyond doubt, however, a first court marshal existed, whose office consisted in protecting the person of the sovereign, assigning apartments in the palace, and in maintaining the peace of the royal household. This first marshal was called *Magister Marescallus*, or simply marshal, and since he bore the name of Marshal as a family name, probably

(*d*) As to the *Constabularius Angliæ*, Spelman, "Glossarium," pp. 183–186, gives us a mass of miscellaneous information. Thus much is proved, that it was not until Stephen's time that an hereditary *constabularia* can be said to have existed, in the person of Milo of Gloucester. His father, Walter, was described in the history of an old abbey, as "*constabularius princeps militiæ domus regiæ*" (Foss, i. 123), which description, again, is capable of various interpretations. A family right to a military command has, as a fact, never existed in England. The report of the committee of the Upper House conceives the *constabularia* as comprising a sum total of services which the King could at pleasure accept or reject (Peers' Report, iv. 269–270).

possessed the office as an hereditary one. But since, after that time, the family of the Marshals (court marshals), and the Clares, Earls of Pembroke (military marshals) became united by female succession, thenceforward, either intentionally or by accident, both offices became blended together in one Earl Marshal. The duties are then threefold:

i. A post of honour in the feudal militia, coming immediately after the constable, with the duties of keeping the rolls of attendance, etc., which were exercised by proxy.

ii. A post of honour in the Exchequer with formal duties, also undertaken by representatives. Thus arose the Exchequer Marshal, who had the right of taking into custody those from whom accounts were owing. After the later division of the governmental departments, the marshals of the English law courts of to-day proceeded from this office.

iii. A supreme post at court, which together with the right to fees and the appointment to certain offices, constitutes to this day an hereditary office. (*e*)

6. **The Chancellor, Cancellarius Regis** is the pre-eminent spiritual personage of the court of the Middle Ages; as is also his office in the court of the Queen, in that of the dignitaries of the realm, and great vassals, in contradistinction to whom he is called the "*Regis Cancellarius.*" His original position is that of a first chaplain, *Chef de la Chapelle du Roi.* But as all writing was originally in the hands of the clergy, the chancellor, in his capacity of private secretary, conducts the correspondence of the King with the Exchequer, the under-officials, and private persons. He is accordingly a court chaplain, in later times generally a bishop or an abbot,

(*e*) On the subject of the *Marescallus Angliæ*, Madox gives us a number of reliable data, which form the basis of later statements. Later on the anomaly arose, that the earl's title of the Pembroke family (at a time when this was a very lofty and rare title in the land), bound up with their hereditary office of court marshal, became united under the title of earl-marshal, which is met with as early as Henry III., and is used in later times in letters patent. Here again the existence of several marshal's offices is perplexing. Under Henry I., Wigan, the marshal, was enfeoffed of certain estates for his marshal's office. A second, apparently a lower marshal's office, we meet with in the family of Venuz, which according to a later statement laid claim to the "*magistra marescalcia*," but is said to have had its claim rejected (Charta I. Joh.).

and has a seat in the Exchequer; from the time of Henry II. he becomes a principal personage in the formation of the administrative departments. His office is and remains a revocable office of trust, and is sometimes granted in return for a fine, in the amount of which the increasing importance of the office is apparent. As early as Stephen's time, a chancellor pays 3000 marks for his office. In 7 John, Walter de Grey pays 5000 marks for the office of chancellor for his life—a method of grant, however, which was soon discontinued. Occasionally a vice-chancellor is also mentioned; and further, a *Clericus Magister Scriptorii*, who acts also as Clerk of the Exchequer; a *Scriptor Rotuli de Cancellaria*, and others. (*f*)

7. The Treasurer, generally a cleric, appears under Henry

(*f*) The Chancellor, *Cancellarius Regis*, is treated of in detail by Spelman (p. 127–135), who gives a list of the chancellors down to James I. Here also the pedigree of the office has been traced too far back into the past, for the *capellani regis* of the Anglo-Saxon period are represented as chancellors of the realm. It was not until the last generation of the Anglo-Saxon period, that the *Capellanus*, *Sigillarius*, *Notarius Regis*, is so frequently mentioned that the existence of an established secretarial department in the government can be assumed (Kemble, Anglo-Sax. ii. 97). The Great Seal which is delivered to the chancellor, and has later its own history, dates from Eadward the Confessor. Hardy (1843) was the first to publish an exact table of the Lord Chancellors and Keepers of the Great Seal, and Lord Campbell to write their lives (London, 1845–1847). A list of the earliest chancellors has been carefully compiled by Foss ("Judges," vols. i. and ii.). Under the early Norman reigns, the chancellor still appears as an official of the second degree, whose signature occurs after those of the bishops and earls, and having a seat among the barons of the Exchequer. The chancellors of this early period were advanced in later times to bishops' sees. It was, however, already an important office; one in which the chancellor, as cabinet-councillor, generally managed all that related to the papal throne, and transacted such cabinet business as required a knowledge of law. By the middle of the period, the position had become so much enhanced in dignity, that the most eminent bishops, and even archbishops, fill the office of chancellor. Nevertheless, the chancellor remains a member of the Exchequer, and under Henry III., also exercises the functions of an itinerant judge. Under Henry III., a chancellor was once appointed to whom the King either could not or would not entrust longer the conduct of the business appertaining to the office; and so the expedient was resorted to of appointing a "*custos sigilli*," who discharged the principal business, without receiving the title of chancellor (Foss, ii. 137, *seq.*). From this period there dates also a distinction, which can never be clearly established, between a chancellor, and a "Keeper of the Great Seal." A vice-chancellor is also met with once incidentally under Henry II. (Foss, i. 160). From this, under Richard I., a formal official position is created (Foss, ii. 21); but one which again ceases. The *clericus cancellarii*, as representative of the chancellor in the Exchequer, is mentioned in the "Dialogus de Scaccario," i. 6, as being even then an important officer.

II., and even earlier, as one of the barons of the Exchequer, among whom he is especially singled out. Bishop Nigel obtained the office for his son, the author of the "Dialogus," in return for a fine of £400. In its later form it increased in importance together with the finances, so that at last it culminated in the office of Prime Minister of the country. (*g*)

A survey of these great offices shows us that they were neither contemporaneous nor homogeneous. They rather point decidedly to a concentration of authority in the head of the Government. When deliberating upon important military affairs, the King would certainly not pass over the high constable; when dealing with foreign affairs, especially the relations to the papal see, he would not easily disregard his chancellor, or the primate; in financial questions, he would not overlook his treasurer. But all the historians mention only single individuals as influential counsellors, and these, too, are described as being constantly changed. The important offices have, on the whole, so much the character of a revocable commission, and the few hereditary offices have relatively such unimportant actual duties attached to them, that a permanent constitutional body could not be created out of them. The assumption of the existence of a permanent royal council, under the name of a "*Concilium*

(*g*) The *Thesaurarius Regis* is described in the complete accounts given by Madox, to which we shall again refer in the following period. Deficient as the information respecting these great officials is as a whole, yet this much is clear, that the persons who really administer the business of the Government, and exercise an important influence upon it, are revocably appointed servants of the King, or officials appointed by commission. The hereditary offices have only a subordinate position in the financial, military, and judicial system, and are not so numerous as in other countries; they are divided into two classes:—

i. *Grand Serjeanties*, corresponding with the higher household ministers of the Continent, high steward, great chamberlain, constable, marshal, butler and others, and which are invariably combined with the tenure of knights' fees.

ii. *Lower Serjeanties*, corresponding to the lower ministers in their various degrees, and combined, not merely with knights' fees, but also with other possessions which were free of service and scutage.

The system of management of the Norman kings, however, did not allow serjeanties to be created in too great numbers, and conceded to them neither considerable possessions nor an influence upon the government of the State. From political reasons it is probable that in the course of the Middle Ages, more serjeanties were turned into fees owing military service, than new ones created.

Ordinarium," or "select council," is rather an anticipation of the result of circumstances which only developed in later times, in the order which I will proceed to state.

Under William the Conqueror everything indicates a "*gouvernement personnel,*" rendered necessary by the complete change of the whole political system, in which the King feels himself strong enough to leave behind him in the times of his absence some great vassal as governor in his stead.

Under William II. this was avoided, and a royal chaplain was impowered to conduct the business of the State, in which the oppressive fiscal system and the firmly established bureaucratic institutions of the Exchequer become developed.

Under Henry I., and the long rule of his grand-justiciary, Bishop Roger of Salisbury, the Exchequer became established as a permanent general *directorium;* which may be compared with the German central military and demesne chambers, and which was at that time the only permanent central department of State (*curiarum omnium antiquissima*), the other business of the central government being conducted by the King, with counsellors whom he frequently changed.

Under Henry II., the Exchequer is further developed into a department, organized in corporate fashion, with periodic sittings for the financial administration and similar business, and into a corporate royal court, while the other business of the central government is still carried on by the King with counsellors whom he frequently changes.

Under Henry III. a government council was first formed as an administrative body for the discharge of the whole business of the State, which formed a basis for the administrative nature of the permanent councils of later times.***

*** Though in direct contradiction to the character of the offices, it is almost impossible to eradicate the view which insists upon a permanent royal council in this period. So soon as the King discharges the current business of Government with a small number of State officials, the existence of a properly constituted "*Concilium Ordinarium*" or "Select Council," is immediately assumed. So soon as he appoints a judicial commission, this is again at once taken to be a "*Concilium Ordinarium,*" either identical with the former or independent of it. If the King only once in deliberation with a meeting of counsellors, composed of prelates and barons, settles important measures, this is regarded as a "*Magnum Concilium,*" almost identical with

the Upper House of later times. Where historians speak of any great gathering, on the occasion of a festival or of a critical state of the realm, a "*Commune Concilium*" is made out of it; which is either supposed to comprehend the collective body of the Crown vassals, or something more or less. Even Parry, who in other places is so clear-headed, is unable to keep clear of this traditional method of regarding things. "The first was the King's Ordinary Council, consisting of prelates, earls, and barons, selected by himself, and assisted by the chancellor, chief justiciary, the judges, and other officers of State. It was not only a Council of State, but the Supreme Court of Justice, and met three times every year at the great festivals of Easter, Whitsuntide, and Christmas; sometimes at Michaelmas, and at other times also by adjournment.

"The *Magnum Concilium* was a larger assembly of persons of rank and property, convened on extraordinary occasions.

"The *Commune Concilium* was a still more numerous body, collected together for more general purposes" (Parl. p. 10).

It is difficult altogether to form any definite ideas from this. Similarly, Hallam (Middle Ages, ii. c. 8, note 13) distinguishes between a *Commune Concilium*, consisting of all the Crown-vassals; a *Select Council* for judicial and administrative purposes; and a *Court of King's Bench*, which is said to have separated itself from the Select Council in Henry II.'s reign (*cf.* also Stubbs: Index, s. v. "Council"). The error lies in the pedantic interpretation which would create constitutional bodies out of a government with changing counsellors. The shapeless form of the Norman central government has brought later historians also into the difficulty how they are to denote the relation of that permanent official body, the Exchequer, to the so-called *Curia Regis*. Madox (i. 154) expresses his views with great caution, calling the Exchequer a portion, or a limb, of the *Curia*, a sort of Subaltern Court; which is correct, if under the term *Curia* we understand the whole central government in its shapeless state.

CHAPTER XVII.

Transitional Period—Itinerant Justices—Justices in Banco—Origin of Estates of the Realm.

However strong the Norman State, by its institutions, might seem to its contemporaries, yet the weakness of a purely personal Government, which was ever losing its support at the death of the ruler, soon began to be apparent. A recognized and duly entitled monarch, and a powerful personality, are the necessary conditions of such a government. Both these elements were wanting in Stephen, whose usurpation of the throne brings about a conflict which, with few pauses, fills up the whole of his reign. It is in England the period of sword law and similar to the interregnum in Germany. The poor rural population were compelled to do villein services, not for royal castles, but for the strongholds of the petty lords. "*Erant in Anglia fere tot tyranni, quot domini castellorum.*" A principal condition of the tardily concluded peace was the razing of the new fortresses, the number of which amounted to 126, and according to other accounts to 375, or even to as many as 1115. We can understand the satisfaction with which, after such a state of things, the people hailed the undisputed succession of Henry II. to the throne, and the concord which subsisted between him and his realm.

Henry II. seems from the first to have found the best security for the new throne in reforms affecting the administration of the realm, which, especially after the commencement

of his conflict with the Church, are of a sweeping kind. About a hundred years after the Conquest three changes are almost simultaneously introduced, which, although they have been already separately treated of in considering the development of the prerogative rights, must be here more narrowly examined in connection with one another; (1) the centralization of the administration by means of itinerant justices; (2) the institution of an official bench of justices, as a royal court; (3) the first beginnings of an estate of the realm formed by the greater barons.

I. **The institution of itinerant justices** was based in an almost equal degree upon the needs of the political government, and upon a concession made to the most pressing interests of the nation. The administration of the counties by the *Vicecomites* had from the first suffered from grave abuses. For this reason even under Henry I. the *Vicecomites* had begun to be relieved of certain judicial business by commissioners sent from the royal court. Reliable information on this point is given us by the oldest extant Exchequer roll, the date of which (according to Hardy's researches) may be safely assumed to be 31 Henry I. (1131). This *rotulus* declares what sums those living within the jurisdiction of the court owed as a result of the *placita* which the commissioners have held; *e.g.* "*Robertus filius Toli, debet XXX marcas argenti de placitis G. de Clinton.*" The total number of the commissioners who were appointed was nine, among whom are three court lords, whose names also occur in the administration of the Exchequer, and as King's counsellors: Ralph Basset, Richard Basset, and Geoffrey de Clinton. The remaining six are greater vassals of the Crown, residing in the neighbourhood of the counties for which they were associated as commissioners with one of the three first-named. The sums, which were to be paid in to the Exchequer are always only credited to the name of one of them; and it is never proved that several commissioners were engaged at one and the same time. We can accordingly deduce from these entries, that towards the end of the reign of Henry I. an innovation was introduced, in

no longer assigning the Crown cases reserved (*placita regis*) by commission to the sheriffs, but in appointing a special commission to deal with them, which was in the prescribed manner so distributed among the counties, that a royal commissioner instead of the *Vicecomes* held court with the men of the county. Under Stephen, this institution, like the whole central administration, had indeed come to a standstill. But all the more pressing was the necessity which Henry II. found for appointing more vigorous commissions, since, under Stephen's reign, the sheriffs had been appointed by the two claimants to the throne from among their partisans, and the presentation of accounts and inspection of the Exchequer, had both fallen into abeyance. Now begins a much more comprehensive system of itinerant *barones* or *justiciarii;* existing both for administrative and judicial purposes, so far as these could be separated from one another under the Norman form of government. (1)

A system of delegation was very necessary for government, and especially for financial purposes, for in the confusion of the times, the royal rights and dues had suffered from numerous usurpations. A uniform rating of the tenants for the tallages and similar impositions was difficult to compass by means of partial and corrupt sheriffs, the appeals against whom had become more and more frequent and pressing. At

(1) The system of itinerant justices has no other origin but the practice of the central administration, and the decreeing right of the Sovereign, and hardly any documentary basis but the notices contained in the Exchequer accounts. Upon this is grounded the summary which Madox has compiled with great care. The later law books speak of the *justiciarii errantes*, as a customary institution, *e.g.* Bracton, iii. c. 11–13. A review of all the various notices is contained in the treatise of Edward Foss, "The Judges of England" (London, 1848 *seq.*), the first two volumes of which deal with this period. The author has collected from this era personal notices of no fewer than 580 justiciaries. The main results are the following. Under Henry I. the *Magnus Rotulus*, 31 Henry I. only gives a limited application of *placita regis*. During the first eleven years of the reign of Henry II. (as under Stephen), a regular institution of the kind cannot be proved to have existed (Foss, i. 171). It was the ecclesiastical dispute with Thomas Becket which first appears to have set the great and popular reforms in motion. From 1166 down to the close of this reign, the itinerant commissioners form a regular chain, with scarcely a break (Foss, i. 174). The objects of the judicial administration come prominently forward from 12 Henry II.

the same time these commissions served for a periodical scrutiny of the manner in which the *Vicecomites* discharged their office. To a still greater extent, as early as 15 Henry II., we find commissions of prelates and barons deputed with definite *articuli* for the purpose of inquiring into abuses of office committed by the sheriffs, their under-bailiffs, the manorial stewards, the foresters, and others. As delegates of the Exchequer, these commissioners are called "*barones errantes*." With these financial schemes military objects could also be combined, which partly affected the castles and their garrisons, and partly other temporary measures. After the year 1181 the more permanent business of organizing the national militia was added to their duties; and now that the old system of the Saxon national defence was again revived, its uniform enforcement could be secured by means of itinerant commissioners. These commissioners had to gather together and review the men liable to military service (*assisa de armis habendis*), and to inflict fines on those who neglected to appear.

Still more general was the need for commissioners for judicial purposes, and especially for the administration of criminal justice. While the land still suffered from the effects of sword law, the right reserved to the sovereign of calling up important criminal cases before him at his court, took another form. The King's peace had to be repeatedly proclaimed; and where the sheriffs lacked the power or the will to act, it had to be enforced by commissioners, who often proceeded in a summary way. From this point of view, all crimes of violence on life and limb, with rebellion, manslaughter, arson, robbery, abduction, forgery, "*et si quæ sunt similia*" were actually brought "before the royal court" (Glanvill, i. c. 2); that is, the reservation of the royal right of intervention had produced a periodical commission of criminal justices delegated from the royal court. At the same time, the Hundred's duty of presentment was reorganized, and the itinerant commissioners were entrusted with the guidance of the parochial committees formed for

this purpose, according to uniform instructions, *capitula coronæ.*

Itinerant commissioners were also employed for the purposes of civil actions. The reason for this lay in the nature of the law which was to be applied. The judgments of county and manorial courts touching the inheritance of fiefs, form of dower, and the rights of the feudal lord with regard to his under-vassals, which were still considerably divergent, required to be reduced to a definite uniform system; and public policy likewise demanded the settlement of questions affecting the status of the knighthood and the freeholders (*quæstiones status*). From these and other reasons, an increased number of civil actions are now transferred to the court (Glanvill, i. c. 3) with the general reservation "*quodlibet placitum de libero tenemento vel feodo potest rex trahere in curiam suam, quando vult*" (c. 5). After the way had once been opened, a flood of such actions streamed towards the court, which was then opened to them only on payment of a fine. A very usual sum was five marks; we meet once with one mark for an action brought in respect of a hide of land; and then, again, a hundred marks for a suit brought for a manor; £100 for an action between the abbot and the citizens of Whitby, etc. Sometimes the King grants to persons of rank or to monasteries the privilege that they should be prosecuted at no other place but before him or his chief justice. Hand in hand with this goes the alteration made in the procedure and rules of evidence in the civil action, which has been touched upon above, according to which, in actions relating to property, and hereditary and possessory suits, the parties were allowed to choose whether the case should be determined by a committee of the lawmen (*recognitio*), instead of by the duel. As being a deviation from the ordinary law of testimony, this needed a special writ, which was issued on payment of a fine, but at first only to "well-affected" knights and freeholders.

This system of itinerant commissioners, employed for such diverse purposes, remained for a long time in a state of fluc-

tuation. Madox has collected the names of the commissioners of 12–13, 15–17, 20–26 Henry II., which occur in the *rotuli*. But it is difficult to obtain a clear view, as for long their appointment depended upon momentary needs. But the aims of the administration of justice become more and more definite, and financial and military ends and objects are associated with it in a more and more temporary manner. Sometimes we find commissioners who restore order in a certain place (justices of *oyer* and *terminer*); sometimes general criminal commissions (justices of gaol delivery); sometimes special justices of dower, justices of assize; and then again *justiciarii ad omnia placita*, or *justiciarii itinerantes* for general purposes (Bracton, iii. c. 11–13). At the Assize of Northampton, 22 Hen. II. (1176), the institution has attained a more definite form, by the division of the country into six circuits, which even then comprised the same counties as to-day. Criminal as well as civil actions were assigned to the commissioners; as also were the superintendence of the procedure by presentment, the guarding of the royal rights on demesnes, escheats, feudal dues, feudal wardships, etc. This arrangement, although it had been settled with the advice of a great assembly of notables, was again altered in 25 Henry II., and a new division into districts attempted. In the year 1194 new commissions were again appointed with an extended employment of juries in civil and criminal cases, and with authority to collect the tallages and crown dues. Finally, the division into six circuits has lasted down to our day; though for a long time general and special commissions, regular commissions, and those appointed *ex tempore*, continued to exist side by side. (*a*)

(*a*) A new epoch is introduced by the extraordinary Assize of Northampton, 1176; at which the counties were distributed into six circuits, and three *justiciarii* appointed for each circuit. Here evidently a new organization was intended, for which it was considered once more advisable to obtain the assent of the *meliores terræ*. Allowing for all possible expansion of the royal sovereign rights, still the institution of itinerant commissioners contained a dangerous innovation upon the Leges Eduardi, and the principle of obtaining judgment by a *judicium parium*. Palgrave (i. 295) assumes (and, for the beginnings of the institution, probably rightly enough) that

The immediate management by the court of such an enormous amount of business was sure to exercise an important influence upon the form of the central government. Hitherto the Exchequer had been the only permanent magisterial department with organized offices; all other national business was deliberated upon by informal "*conseils*," and partly dealt with by judicial commissions in the usual forms appointed

the itinerant justices were only commissioned to examine into the facts, whilst the judgment was reserved to the King at court. The peculiar form of Norman court justice had, however, brought about in England a submission of the parties, which found no parallel upon the Continent. A royal special commissioner now brought with him the authority of the King himself; whence an appeal to the *Curia Regis*, that is, to the supreme appointing power, was considered useless. Hence can be explained how commissioners in such early times not only acted as expounders of the law, but themselves gave judgment, and that (at all events, to judge by its results) their sentence was considered final. Even in somewhat early times the commissions of justices appointed to pronounce final judgment on crimes in the name of *Curia Regis* ran, "*ad audiendum et terminandum.*" If a number of county justices were associated with these commissions, this was but a reminiscence of the old position of the witan, and soon became a formality. The same fate befel it that appeared, in later times, in the decay of the institution of Schöffen in Germany. But if this condition of things, which had arisen from the necessity of justice, was to become a permanent political institution, it can easily be conceived how even an absolute government deemed the assent of the Crown vassals advisable, especially in those days of church quarrels. We can perceive, nevertheless, how little the resolutions of such assemblies of notables possessed the binding force of positive rules of law. Within three years, at an assembly held at Windsor (25 Henry II.), those resolutions were considerably altered, although at this assembly only a number of prelates and Crown vassals are mentioned after the ordinary fashion of royal councils (Parry, Parliaments, 16). The country is now divided into four circuits, and the constitution of the commissions altered (Foss, i. 171). In later times, we find, as a rule, at the head of the list of the itinerant justices, such ordinary *justiciarii* as are at the same time members of the bench of the King's court which had been established in the meantime. Then follow those who were mere *justiciæ errantes*, frequently under-officials, who in later times were promoted to be regular *justiciarii*. Landowners and clergy of the county were often added to their number, especially where it was a question of collecting tallages and other impositions (Foss, i. 334, 335). Under John the circuits were interrupted for several years, especially when the king held circuit in person, in which case he was accompanied by a few *justiciarii* (Foss, ii. 27). Under Henry III., a bishop or an abbot, and one or two ordinary *justiciarii* of the "*banc*um" are generally at the head of the commission; the others are greater or lesser vassals of the Crown, or clergy of the county (Foss, ii. 191, 192). In the middle of the thirteenth century, the law-book of Bracton gives us the formula of a special writ issued for the appointment of an itinerant justice: "*Constituimus vos justitiarium nostrum, una cum dilectis et fidelibus nostris, A. B. C. ad itinerandum per comitatum W. de omnibus assisis et placitis, tam coronæ nostræ quam aliis, secundum quod in Brevi nostro de generali summonitione inde vobis directo plenius continetur.*" The manner in which the new institution of *recognitiones* and the courts of presentment were combined with the itinerant justices, has been described above.

for the purpose. In this informal manner a permanent creation arises.

II. This was the origin of a **Court of King's Bench** under the general name of *Curia Regis*—a second permanent official body existing side by side with, and to a great extent blended with, the Exchequer. The judicial cases reserved for the King, which had been in earlier times assigned to the Exchequer or a county court, were now as a rule dealt with by itinerant commissioners; who might be members of the Exchequer, and also might be other prelates and barons, learned in the business of the courts, and assisted by under-officials of the Exchequer or other clerks. These commissioners found themselves on the one hand continually obliged to refer to the Exchequer, with which they remained connected on account of the fees, fines, escheats, forfeitures, tallages, and other financial and military business; and on the other hand, the itinerant justices had numerous cases to determine for which they had to frame new maxims as well as principles to determine both the procedure and the law which was to be applied. Under Henry II. there was instituted for these weighty juridical questions a sort of bench or *bancum*, consisting, it appears, at first of itinerant justices, and to a certain extent identical with the functionaries of the Exchequer. The *summus justiciarius* is the head of the Exchequer and of the *bancum*, and there existed for a long time a similar arrangement to that which still exists in England: viz. various magisterial departments composed of the same persons as functionaries. The same person can be in his capacity of itinerant justice, a justice in Eyre; as a member of the Exchequer staff, he is a baron of the Exchequer; as a member of the King's court he may be a justice *in banco*. Hence it is difficult to determine the exact year with which the formation of a bench of justices began. In any case, the authority we possess is a decree of 24 Henry II., according to which five commissioners were appointed, "who shall not journey through the land, but shall hear pleas at court." The business was so distributed that the great mass of it was dis-

charged by the itinerant justices; but the more important cases were dealt with by the judicial bench, that is, either in the Exchequer or in the King's court *in banco*. (2)

During the second half of the reign of Henry II. we arrive at the following definite results:—

1. A considerable number of persons form a permanent body of justices, under the title of *justiciarii*, who are so styled officially in the royal rescripts. Soon after Henry II., royal patents addressed to the "Chief Justice and his other justices of England" are met with, which formally express the official character of the ordinary justiciaries. The chancellor, too, acts as justiciary, as do occasionally also all the great officers of State, whom we find among the itinerant justices acting as heads of the commission. That the clergy, being learned in the law and in the discharge of business, are much and constantly employed, is shown by a list (Foss, i. 161), in which occur amongst the chancellors and justiciaries of the period the names of five archbishops, eight bishops, three abbots,

(2) The origin of a Court of King's Bench is in like manner a creation of the administrative practice. It first appears in the administrative records, is then recognized in the law books as an existing institution, and is finally traced back to common law. The time of its origin must be accordingly determined by a kind of circumstantial evidence, to which the word *justiciarius* gives us a clue. Formerly every royal commissioner was so called, *e.g.* those who were entrusted with the drawing up of Domesday Book, the royal commissioners in the army, and even ship captains (*justiciarii navigii regis*). It was not until the time of Henry II. that the term received the more special meaning of a permanent *commissarius* for judicial business. Such commissioner-justices were formerly no more frequently found than were permanent judicial commissions. The *summus justiciarius*, too, does not become an ordinary officer of the realm until the time of Henry II. As late as 1165 and 1177, Hoveden terms the justices appointed by the King, quite indefinitely "*fideles*," "*familiares*," and "*barones curiæ*." There certainly existed a closer circle of prelates and barons about the person of the King, who as being men learned in the law were habitually employed in the Exchequer and on commissions; but they formed no "bench," and had no permanent offices. The assizes of Clarendon, that is, the year 1164 or 1165, appear here, too, to be the turning point. With this date begin the regular lists of the itinerant justices. The necessity of issuing uniform instructions to these commissioners, and the necessity for a mutual communication of, and accounting for the legal principles to be applied, soon led to the formation of a bench, in which could be found the necessary uniformity in practice. A further clue to the date is given by the fees which are paid by suitors for license to bring their plea before the *Curia Regis*; the oldest instances of such fines are found in the Exchequer rolls, 15 Henry II. (Madox, i. 96, 429). Everything points to the period 1165–1179 as that in which the Court of King's Bench originated.

eight archdeacons, and two royal chaplains. From the time of the first formation of the Bench onwards, its members appear as a higher class of ordinary *justiciarii*, taking precedence of those who are merely *justices itinerant;* but the latter were afterwards frequently promoted to be ordinary members of the Bench. (*a*)

2. That at the close of Henry II.'s reign there was a perfect system of procedure before justices *in banco* at the King's court, is shown by Glanvill's work. This procedure had attained to such a settled and scientific perfection, that an established practice of the judicial body must have for some time existed. With this King's court, the momentous reforms in the procedure of the civil action (*recognitio*) have been associated by Glanvill; and indeed they were connected by him with the same disputes touching possession, ownership, and inheritance, that were simultaneously decided in Normandy by committees of the *vicinetum*, committees which had already long existed there as customary *enquêtes*. (*b*)

(*a*) The personal accounts have been carefully collected in Foss, vols. i. and ii., but a comparatively mixed employment of the judges is still continually manifest. Thus, for instance, once under Henry II., the chancellor and the constable together hold the assizes of Kent; under Richard I. the chief justice, Archbishop Hubert, presides at the county assize, and his colleagues on the commission deal with the *placita coronæ*, disseizins, inheritance cases, etc. The royal decree of 24 Henry II., according to which five commissioners are appointed "*qui a curia non recederent*," but whose duty it is to hear pleas at court (Bened. Petr. 266, A.D. 1178), contains the origin, or at least is an evidence of the prior existence of a Bench of Judges.

(*b*) For the procedure *cf.* Glanvill, vii. 9. sec. 7; xiii. 15, sec. 6; ii. 6, sec. 4; v. 4; Spence, Equitable Jurisdiction, i. 101, 112, 128. Since the acceptance of ordinary civil suits at court, and the allowance of a *recognitio*, are royal favours, and since in all cases reserved the ruling of the court presupposes a personal act of the sovereign, the civil action in the *curia* assumes almost the form of a Roman procedure by rescript. The plaintiff must sue out a writ for this purpose, for which he has to apply to the secretary of the King, the chancellor. In the regularly recurring cases, the writ soon became a matter of course, and was to be obtained from the clerks of the Exchequer on payment of a fee. The initiative writs now became *formulæ actionum*, obtained through the interposition of the chancellor as *officina justiciæ*. Through the association of the itinerant justices with the county courts, a new *ordo judiciorum* arose; viz. commencement of the action by writ, summons by the sheriff as under-officer of the supreme court, *litis contestatio*, and replies according to the Norman rules of pleading, in certain cases empanelling of a jury (*recognitio*), which in course of practice became extended to a general employment of a civil jury. These oldest pleadings are printed in the "Placitorum Abbreviatio," (1811, folio) more in detail in Palgrave, "Rotuli Curiæ Regis," vol. i. from 6 Rich. I., vol. ii. 1 Joh.; Lond.,

3. According to an opinion formerly prevalent, a civil division for the *communia placita* separated itself from the royal court *in banco* in Richard the First's reign, so that at that early time a double judicial body is said to have existed for the hearing of cases, a *bancum regis* or royal court proper, and a *bancum commune*. The chief authority for this assumption was Coke's preface to his Eighth Report, which in making this statement contradicts Lord Bacon. The careful researches of Foss (ii. 161–179) are, however, sufficient to rebut this view. (*c*)

In the whole formation of the King's court *in banco*, we must not overlook an original and long enduring connection with the Exchequer; which can be explained by the fact, that the Exchequer had long existed as a magisterial department, in which the procedure of the central administration had become pre-eminently perfected; as well as by the fact that the central government still employed the same persons, in varied capacities, sometimes for financial, and sometimes for judicial purposes. This continuous connection is shown in the following points.

(i.) The *summus justiciarius* was the common president of the King's court and of the Exchequer; and the Exchequer as the elder magisterial department remained so closely associated with the other, that it was not until centuries later that an appeal from the Exchequer was allowed; whilst the *bancum regis* became, immediately after its origin, the court of higher instance for the *bancum* of the *communia placita*.

1835–38. The treatise of Gundermann, "Besitz und Eigenthum in England" (Tübingen, 1864), gives a useful sketch of this formulary system. See also Brunner, "Entstehung der Schwurgerichte."

(*c*.) It is conclusive evidence, that the three passages in Glanvill, which speak of the *justiciarii in banco residentes* do not say a word about a double *bancum*, that other testimony upon this point is wanting, and also that a chain of circumstances speak against it. There existed, as a matter of fact, down to Magna Charta, only one court *in banco*. The proceedings before it were described by Glanvill as "*coram justiciariis in banco residentibus*." Expressions, such as "*diem habet in banco*," were from Richard I.'s time tolerably frequent; royal decrees were also issued to the "*justitiæ in banco*," or to the "*justiciæ de banco*" (Foss, ii. 171). The expression *bancum* (bench), to denote the judicial body itself, did not, however, become current until the following period.

(ii.) All great officers, who were *ex officio* members of the Exchequer, and had their representatives there, were accorded the same right in the newer King's court. The constable and marshal had accordingly representatives of the same name in the King's court, and in those courts which arose out of it when it became later subdivided. The same right was also conceded to those members, when the Exchequer of Jews became separated from the chief Exchequer. In like manner the office of the hereditary usher became subdivided.

(iii.) The personal privileges of the officials of the Exchequer were transferred to the *justiciarius* of the newer King's court; notably an immunity from the common amerciaments of the county and from scutages, and a privileged position in using the court tribunal for the settlement of their actions at law. These exemptions were expressly referred to the old privileges of the Exchequer, "*per libertatem sedendi ad scaccariam.*"

(iv.) The offices remained to a certain extent common to both, as was also the court house. The Great Seal was as a rule kept in the treasury of the Exchequer (Foss, ii. 9). The King's court properly followed the person of the sovereign, but its usual seat, notwithstanding, was with the Exchequer in Westminster (Foss, ii. 168).

(v.) In consequence of the original connection subsisting between both departments of justice, the routine of business was discharged by clerks from the Exchequer; that is, according to its older pattern. Hence the unmistakable coincidence of the *rotuli* and records of the *Curia Regis*, with the business formularies of the Exchequer. Even after the court had in later times become separated, the fines, amerciaments, tallages, aids, and scutages, were in the old fashion still accounted for to the Exchequer, by the itinerant justices. The old principle "*recordationem curiæ regis nulli negare licet*" (Hen. I. 31, 49, sec. 4), was an original principle of every royal central administration, and did not first originate in the manner of constitution of the King's court; both before and after it was a rule for the Exchequer also, for which

it is incidentally recorded under Edward I. (Madox, ii. 25).**

Both departments are still always regarded as an emanation of the personal government. "*In curia domini regis ipse in propria persona jura decernit*" (Dial. de Scacc., i. c. 4). The king, when it pleases him, appears himself as an itinerant judge, and presides in person *in banco;* instances of this kind, until Edward II., have been collected by Palgrave; and not unfrequently a judgment is postponed on account of the King's absence. The whole primitive form of a king's court, as we can thus perceive, is as unstable as all new creations of administrative practice. With the rise of a judicial body the grand period of the professional bureaucracy in England had arrived. From Henry the First's day an official nobility begins to be formed, by means of which certain lesser vassals and clerics attain the rank of greater barons. The clergy are still in possession of the Latin official language, but side by side with it, the Norman idiom and other technical qualifications assert themselves, in which the laity successfully compete; among the latter a class of law jurists raises itself

** The Exchequer as a financial body appears under Richard I. as severed from the judicial body of the *Curia Regis*. It continues to decide the legal questions within the financial administration, and the King still makes use of his right of allowing ordinary civil actions to be decided at his will, by the *barones scaccarii*. In its principal activity, however, the Exchequer is and remains the centre of the receipts and disbursements, the court of account for the sheriffs and other accounting parties. In the Exchequer the office of sheriff continues to be farmed out. Sheriffs, escheators, and certain under-officials, take their oath of office in it. In like manner from the Exchequer proceeds the deposition of individual sheriffs, and under Henry III., even a general deposition of them all. The taking of oaths of fealty, grants of feoffments, compromises *ad scaccariam*, now frequently occur. From the Exchequer issues also the summons of the land army, addressed to the sheriff. The administrating body consists now of the chief justice and the barons; but among these the treasurer becomes more and more prominent, until, after the disappearance of the chief justice, he becomes the proper presiding judge. Under Henry III. the office of Chancellor of the Exchequer appears to have arisen (Maunsell, 18 Henry III., *cf.* Thomas, "Materials," 9, 10); in any case, from this time he is more frequently mentioned. From Edward I.'s time a treasurer's lieutenant is also found. The sittings in the Exchequer are still held occasionally under the personal presidency of the King, who at other times gives his orders by writing under his private seal, or verbally, and quite informally by messenger. We shall refer again (chaps. 22, 23) in the following period, to the position of the chancellor, the chancery of the realm, and to the system of the *rotuli*.

to great importance. In spite of much jealousy an *esprit de corps* now appears to pervade the great body of ecclesiastical and lay officials, who find their common bond of union in the Chancery and Exchequer. It was the dignity of the profession, and the cultivating influence of their daily occupation of administering justice, which enabled, even under an absolute government, an honourable judicial class to be formed; just as in ancient days, the Roman empire developed an honoured juristic body from the professional administration of justice. After the establishment of a Bench of Judges in the *Curia Regis*, the one-sided fiscal spirit of the Exchequer found a counterpoise under more enlightened reigns. In the law book of Glanvill, which was written as early as the close of Henry the Second's reign, an unmistakable progress is manifested, not only in the subtle technicalities but also in a worthier conception of the royal vocation of administering justice. Still more clearly is this judicial spirit shown half a century later in Bracton's work, with its very liberal views of the royal duties and of the power of the laws as being superior to the arbitrary will of the King.

The old shapeless *Curia Regis* becomes now embodied, for the discharge of two chief groups of national business, in two regularly constituted official bodies, the King's Court and the Exchequer. The transactions in writing between the King and these two are conducted by his cabinet council, the chancellor and his clerks. As a member of each department, the King forms between them a department of his own; one which, as *officina justiciæ*, regulates the subjects of procedure and the actions dependent upon royal writ, both of which are assigned by writ to their respective tribunals. From the close of Richard the First's reign the chancellor keeps his own registers (*rotuli cancellariæ*) which, divided into the heads of Charter, Patent, Fine, and Close Rolls, have been printed in recent years.

Side by side with these momentous changes in the administration, are seen the first indications of certain alterations

in the constitution, the importance of which cannot be overestimated.

III. **Origin of the Estate of Greater Barons.** In spite of the fully developed sovereign political rights, Henry II. found his position less favourable than that of the first three Norman kings. The prevailing ideas of every age are determined by the immediate past, and this had severely shaken the belief in the omnipotence of the kingly power. Stephen, as well as his female opponent, had granted a number of concessions and submitted to a number of humiliations; the title and the privileges of the royal dynasty had been for twenty years discussed in every cottage. After such events Henry II. did not find it an easy task to restore the old form of government. With the far-seeing shrewdness of his race, he contrived to find first an able bureaucracy that was subservient to him personally, in order to restore the surviving administrative organization. The mass of the Saxon population was won over by exercising sharp surveillance over the sheriffs, by protection afforded to tenants against the arbitrary imposition of tallages by the landowners, by concessions made to the towns, by a universal extension of legal protection, and by certain restrictions on duelling. The somewhat milder enforcement of the forest laws and the feudal dues, as well as the strict regularity of the whole administration, were acceptable to all classes.

But the relation between Church and State had become the most strained of all. During the time of sword law, the privileged jurisdiction of the clergy had been expanded in a manner which was in direct opposition to the uniform system of the Anglo-Norman political government. Henry II. was no less determined to assert his sovereign supremacy, than was his ambitious primate, Thomas Becket, to enforce the new principles of the century on behalf of the supremacy of the Church. The ecclesiastical disorders now form the turning-point, at which the King found it advisable to proceed only with the express sanction of the Crown vassals. He did this, as has been explained above (Chapter XV.),

simply by summoning to extraordinary court days the more distinguished prelates and barons to discuss with them important measures touching spiritual jurisdiction. The first step in this direction was, that in January, 1164, the King laid before them the sixteen Articles of Clarendon, touching the submission of the ecclesiastical body to the royal feudal and judicial control, and that he had these articles recognized, confirmed, and finally attested, by the greater barons and the bishops. Thus the innate national idea of the highest legislative power, "*consensu meliorum terræ*," awoke to a new life. As the opposition of the Archbishop still continued, the King soon after summoned not an ordinary judicial commission, but for the first time the collective body of the great prelates and barons, in order, by formal judicial sentence, to declare the primate of the realm guilty, and in "*misericordia regis*." The idea of an administration of justice by the "King in the national assembly," is thus revived. †

The unfortunate course of the ecclesiastical controversy caused extraordinary court days to be summoned more than once, at which, in addition to ecclesiastical questions, important reforms of the temporal jurisdiction were put forward for discussion, deliberation, and approval. In these the question was one of fundamental departures from the *judicium parium*, and from the Norman judicial custom of the duel; a question of principles already enforced in practice, but for which the assent of the vassals of the Crown seemed

† The state of ecclesiastical affairs in the half century from 1164–1214, undoubtedly prepared the beginnings of a new constitution of estates of the realm. Though the encroachments of the spiritual councils under Stephen formed no recognized precedents, yet it became involuntarily recognized that ecclesiastical affairs could not be finally ordered by the sole authority of the King; that the Church represented a political system standing on its own rights; and that the English Church formed an inseparable branch of a universal Catholic Church of which the King of England was not the sole head. To put an end to this state of affairs, Henry II. decided to summon the extraordinary assizes at Clarendon and Northampton in 1164, to consist of the collective body of great barons of the realm, all the bishops, and the most distinguished abbots, all of whom emerged from the great mass of *tenentes*, as an united body. The name "assize," which is henceforward used by historians as well as by legal writers, indicates the beginning of a new conception, which is the first step towards legislative parliaments.

to be advisable, in order to convert decided departures from the legal usage of both nations into permanent national institutions. Seeing that it was vitally important for the King to obtain the vassals' sanction in the ecclesiastical controversy, Henry was obliged to make those measures which were essentially necessary for the times more acceptable, by requesting the assent of his Crown vassals, a step which is always popular at the first beginning of a political constitution. The King also does not disdain, as in the Anglo-Saxon period, to proclaim once again, with the advice of his Witan, the "King's peace;" this was published in the Assize of Clarendon with the addition, "*quam dominus rex Henricus consilio archiepiscoporum et episcoporum et abbatum cæterumque baronum suorum constituit*" (Palgrave, i. 257). In this direction two innovations are conspicuous, in which the national fundamental idea of the legislative power is revived.

1. In place of the informal councils, the collective body of the great prelates, the earls, and great barons were summoned; in the resolutions of the council itself, this "*consilium archiepiscoporum, episcoporum, abbatum, comitum et baronum (optimatum procerum)*" is expressly mentioned; and at Becket's condemnation, this assembly acts as a peers' court in the form of a great feudal *curia*, and no longer as a judicial commission appointed by royal supreme power.

2. To take part in the most momentous resolutions on one of these two occasions, there were also invited a number of smaller Crown vassals. To the Assize of Northampton (1176), the *milites et homines regis*, were summoned in addition to the *barones;* or, according to other accounts, also the *Vicecomites* and *barones secundæ dignitatis*.††

†† The necessity of attaching the temporal vassals to the King's cause by concessions, caused Henry in those twelve critical years, to take counsel with his assemblies of notables touching other points of the temporal jurisdiction, which produced a material alteration in the customary legal system (*lex terræ*). The Assize of Clarendon (1166) on the subject of maintaining the public peace (Palgrave, "Commonwealth," i. 257, ii. 178; "Select Charters," p. 143), recognized important institutions which had sprung up from the practice of the courts of law and of police. According to the King's idea, these were only deliberative estates, and were certainly not intended to be prejudicial to his sovereign rights. It was believed that

In connection with these events, a distinction between *barones majores* and *minores* is first conspicuous in a solemn political act; and this distinction has until the present time continued to form the subject of lively controversy. The word "*baro*" originally denoted a man (*baron and feme, barones civitatis London, court baron, baron to the Cinque Ports*). After the Conquest it gradually usurped the place of the Anglo-Saxon title of Thane, apparently in order, like the Latin *homo*, to express the feudal dependence of the "men" upon the King. In comparatively early times, by *barones* were pre-eminently meant the *barones regis*; that is, the *tenentes in capite*, who from the first were divided according to the amount of their property, into greater feudatories and lesser Crown vassals. Thus property qualification becomes again connected with political institutions. *Barones majores* and *minores* had for a long period been distinguished in the feudal militia. All such as led divisions of their own, were regarded as bannerets or officers in the feudal army. On the Continent, fifty *milites*, or at least twenty-five, were reckoned to one banneret; in England, in proportion to the smaller scale of enfeoffments, a smaller number appears to have formed the unit of the *constabularia*. In the active army, the King certainly appointed the commanders, but it was inevitable that the greater vassals, who by virtue of their feudal possessions had to furnish whole *constabularia*, should regard themselves as entitled by birth to be officers (*seigneurs*) of the feudal militia.

if the magnates of the land had once declared their assent to an institution called for by the times, the matter was set at rest by the new institution having obtained a recognition of its legality. This conception the political government adhered to for a whole century. After 1176, we hear no more of assizes under Henry II., nor of any under Richard Coeur-de-Lion. It is not until 5 John that a royal decree is mentioned (Patent Rolls, 5 Joh.) which regulated the "assize of bread," "*communi concilio baronum nostrorum.*" It may be that it was necessary to connect the regulation of the prices of provisions (as being a measure of vital interest to the national life) with due formality with the *Assisa de pace servanda* under Henry II. It is not apparent that any general assembly was convoked at this time (25th April, 1204) (*vide* Selden, "Titles of Honour," 735); it appears rather that only an ordinary council was held, whose assent it was found advisable to mention at the promulgation of the measure.

From the first, the distinction between *barones majores* and *minores* was known in the Exchequer. Reliefs, wardships, and marriages of the great feudatories formed the principal items in the financial administration. Whilst those of the single knight's fee were fixed at a hundred shillings, those of the greater lordships were not until later times fixed at a hundred marks; and in this respect we often find a dispute, as to whether the *relevium* of a fief is to be calculated on the fief as a barony, or separately on the single fiefs. In computing the amerciaments again, the greatest feudatories are more highly taxed; on which account certain Crown vassals appeal against their rating as "barons," on the ground that they only possess single fiefs. A notable example of this is the case of the Abbot of Croyland (19 Edw. II.).

From the earliest times *barones majores* and *minores* were distinguished at court. Of course it was only magnates who were able to attend the gorgeous assemblies with a retinue. To them by custom an express invitation was issued, and by custom they were treated with much greater distinction than the knight without attendants.

For the same reason there had long existed in the popular mind and in the language of common life, *barones majores*, and *barones minores*.

We can easily understand from this condition of things, that contemporary writers make use of the expressions "*barones majores et minores*," in such a manner that a later age was led to conceive of the difference thus drawn as a distinction in rank, which, however, viewed by the light of the law, does not in reality exist. A difference in rank would presuppose that the great estates were held by a special tenure in a different manner from the simple knights' fees, but in the great register of the fiefs made in the time of Henry III. and Edward I., and which was printed in 1807, under the name of Testa de Neville, the terms *honors*, *baronæ*, and *feuda* are used in such confusion that a definite and legal distinction manifestly does not exist. The expert who wrote under

Henry VI. his treatise upon feudal tenures (Littleton on Tenures), upon which the later works of Coke and Blackstone are based, knows no distinction between tenure by barony and tenure by knight's service; and this legal authority is sufficient to determine the question.* Just as little were the greater and lesser Crown vassals distinguished by their family designations. The greatest feudatories are sometimes only denoted by a Christian name, and sometimes by a family name, with or without the prefix "de"; the same is the case with the lesser vassals of the Crown, and also with the under-vassals. In a few families (Baro Stafford, Baro de Greystock) the word "*baro*" becomes customary for well-known reasons, yet this is not peculiar to the greater vassals. These circumstances induced the Committee of the Upper House when examining into the question of the peers' dignity, to allow that an "estate of the realm" did not exist before the time of Magna Charta. The actual and social difference was still no *legal* one, not legal from the point of view of public law, because no *cour de baronie* existed; not legal from the point of view of private law, because greater as well as lesser *tenentes in capite* have equal rights of tenure.

Notwithstanding that the state of the kingdom had repeatedly compelled Henry II. to accord to the most conspicuous spiritual and temporal vassals a voice in legislating, yet it is

* In the relations of private law no difference could anywhere be found between a knight's fee and a barony. All the incidental distinctions only rest upon the administrative practice; and even in the Treasury records it took a long time before the various amounts of the *relevia* led to a fixed distinction; as in the Rot. 9, Henr. III., "*Per inquisitionem, quam Rex præcepit fieri, idem Walterus tenuit de Rege in capite per foedum militis, et non per baroniam*" (Madox, i. pp. 318, 681, where we also find other instances of the use of "*baronia*" and "*honor*" for those possessions which pay the great *relevium* of a hundred marks in a round sum). The manner in which the "*Dialogus de Scaccario*" (ii. cap. 10) speaks of "*baroniæ majores et minores*" proves that even in the practice of the Exchequer as it was in those days, there existed as yet no fixed terminology. The law book of Bracton (ii. p. 39, sec. 6) is the first to testify that in those days the tribunals began in certain particulars to distinguish between "*baronia*" and "*vasoria*"; "*quod dicetur de baronia non est observandum in vasoria, vel aliis minoribus feodis quam baronia, quia caput non habent sicut baronia.*" But this conception only dates from the middle of the thirteenth century. It was not until Henry III.'s reign, after Magna Charta and a multitude of other precedents, that the popular tongue began to speak of the "baronage" as the sum total of all the greater Crown vassals (Parry, "Parliaments," xi.).

clear that the King in convoking the notables had just as much freedom of action as he had in originating all the *consilia optimatum*. The summons was issued on the ground of personal confidence, and especially to such as were already honoured with important confidential offices, it was issued in accordance with the custom of the court, which had always honoured certain great vassals with a personal invitation (writ), and it was issued on the basis of the size of their estates, which was known in the Exchequer, and with regard to the distance at which their places of residence lay, of course paying due regard to their personal standing and the opinion of their compeers. And accordingly these conventions were not "feudal parliaments," but only great councils of notables, and for that reason they cease, and disappear for more than a generation.

As to the form and effect of such a summons, nothing was definitely settled in this period. But there were precedents extant, cases in which the King had taken the opinion of his vassals "*super arduis negotiis regni*," and had obtained their assent. If this assent was proper in the eyes of the King, it appeared still more proper in the eyes of the vassals. For resolutions of this kind the denotation "*assisa*," borrowed from the feudal *curiæ* of the Continent, is used; and even the law book of Glanvill, in dealing with material alterations made in the legal and judicial constitution, lays stress upon the question whether they had been brought about by an *assisa generalis* or not. The monarchy in these convocations had pursued merely temporary aims; but for the first time for many long years the great barons had again assembled in the political councils. The historians speak again of the King as "*cum principibus suis de statu regni et de pace confirmanda tractans*." The rights of the estates of the realm had once more attained a definite form, and on this account the court days of Henry II. were important precedents and of considerable moment in the events which led to Magna Charta, and also as one of the bases of the later parliamentary law.†††

††† The impediment to progress in this direction lay at this time still in the nature of the Crown vassallage itself, which, consisting as it did of

hundreds of small feudal possessors, did not contain the element of a political peerage. This difficulty increased just in the times of the Crusades by reason of the numerous alienations of single knights'-fees and smaller parcels of land; so much so that we now meet with *tenentes in capite* in possession of one-twentieth, one-hundredth, or one three-hundredth of a knight's fee. As it was impossible to draw a sharp line between the greater and lesser vassals, only the form of the royal summons remained wherewith to form an assembly of notables capable of legislating. If this summons was wanting, there was an end of the great court days. And thus it came to pass; the Assizes of Clarendon and Northampton were not repeated for a whole generation.—In modern times the critical theme of *barones majores* and *minores* has been again treated of in detail by Hallam ("Middle Ages"), and with much caution in the Peers' Report (iii. 87, 97, *seq.*, 109, *seq.* 254). If in the latter we are forced to acknowledge that the summons to a *consilium regis* at this period was exclusively dependent upon an act of the sovereign, this negatives the idea of an "estate of the realm" consisting of Crown vassals, since the choice among hundreds was entirely dependent upon royal writ. The English nobility itself would be brought into difficulties by the confused idea that every vassal of the Crown in the Norman *Curia Regis* was entitled to a seat; for the claims to a seat in the present House of Peers would have been innumerable if every descendant of a possessor of three or four hides, who at one time or other had belonged to the *tenentes in capite*, could lay claim to baronage by tenure.

CHAPTER XVIII.

Magna Charta.

After the rule of Henry II., which was energetic, though in its latter years full of vicissitudes, comes Richard Cœur-de-Lion, adventurous and aimless, but a faithful reflex of the times in which he lived, and accordingly popular. The regency, appointed for the time of his crusade, soon came into conflict with the great barons and with the King's brother John. During the absence of the King, England again saw one party of the barons in feud with another discontented faction. With his return from captivity the personal rule of the King is restored, and he now holds a court day (*colloquium*) after the old fashion, sits in judgment upon his brother John and upon a bishop, imposes a hide-tax of two shillings upon every hide of land; but, engaged in unceasing feuds upon the Continent, loses his life at a siege. The absence of this knight-errant from English soil, which was, with the exception of a few months, continuous, proved extremely beneficial, in so far as it rendered the continuance of an organized internal government possible.

The reign of John which followed appears again to unite in itself the worst qualities of the Norman system. This King, who had already proved a faithless son and treacherous brother, forfeited by the murder of his nephew Arthur his French fiefs, and thus brought about the separation of Normandy from England. He involved himself in a struggle

with the papacy, and concluded it by a humiliating submission. In his government of the realm he was still more aimless than Richard, harsher and more avaricious than any of his predecessors; he estranged all classes of the people successively by cowardice and cruelty, by greed and arbitrariness. At length he brought about a crisis in which all elements of opposition against absolutism leagued themselves together and took action in common.

First and foremost among these opposing forces stood the Church, which even under Henry II. had asserted itself as a power equal with the monarchy. The time had arrived when Innocent III., in the zenith of his might, at the Lateran Council (1215) proclaimed the Church as the universal monarchy. In his rupture with this power John brought matters to such a pass, that the Bull of excommunication was proclaimed to his face, and his deposition from royal dignity, and the absolution of his subjects from their oath of allegiance were published upon English soil.

But among the temporal vassals also much had been changed since the Conquest. Since the Crusades the consciousness of the dignity of the military profession had mightily increased. The strength of the heavy-armed warriors had for generations decided every conflict; all the power of princes now primarily depended upon the number of such warriors. The equal balance of conditions throughout the whole of Christendom, and the sanction of the Church, had created an *esprit de corps*, which under the walls of Jerusalem had formed for itself an universal code of honour, which even princes could not refuse to acknowledge, and which found in tournaments and social customs further support and expression. Whilst therefore the barony and knighthood began to feel themselves a unity, they were bitterly aggrieved by the arbitrary imposition of scutages and income taxes; and now, too, when in the Exchequer and in the government of the country bailiffs the prosaic system of amerciaments and fines had reached its climax, John, as the guardian of orphans, dealt with his feudal wards with

unheard-of injustice, and regarded the wives and daughters of his greater vassals as objects for his licentious desires.

In the towns of England also, as well as amongst the freeholders, much had in the course of time been altered. The extension of the feudal law, with its rigid rules of inalienability and primogeniture, to the whole landed property, had in its very excess become an unnatural system, in opposition to which the natural laws of political economy and family life tacitly asserted their rights. By the circuitous path of royal licence on payment of a fine the alienation and partition of feudal estates had to a considerable extent been resumed. Marriage and decease, inheritance by daughters in equal shares, escheat and regrant in smaller divisions, subinfeudation, and even direct selling in parcels (which was done by the vassals on embarking for crusades, and was favoured by the Crown) had brought about new estates of freehold in land. Mercantile and commercial business, promoted by the crusades, which had exercised a most beneficial influence upon the cities and boroughs, had, after the time of Richard I., raised a considerable number of English towns to a high degree of independence. This class also, in spite of its innate loyalty, was in a humour to make common cause with the spiritual and temporal Crown vassals against despotism.*

* The events of the origin of Magna Charta have been portrayed by historians with justifiable predilection. (Cf. Lappenberg-Pauli, iii. 293–487.) For the purpose of this description it is important to consider the relationship between the powers who league together in the act of June 15th, 1215, against the monarchy; and the shifting of which in the following half-century brought about such a marvellous change in their positions. The counterforce of the Church was at this time the most imposing as well as the most stable. Archbishop Stephen Langton himself, in spite of his promotion by the Pope, strongly impressed by the popular feeling, not only undertook for a time the conduct of the movement, but remained staunch to the right cause, and may with justice be considered a patriot. But immediately after success had been gained, the imperious behaviour of the Curia towards the barons reminded the nation only too sensibly that a spiritual absolutism existed side by side with the temporal. Among the Crown vassals of this period the majority had only risen to importance under Henry II., and owed their influential position to the newer system of political administration. At the head of the armed opposition stood pre-eminently the northern barons. In the framing of Magna Charta, the school of the official nobility formed under Henry II. is recognizable. All parties of the then existing nobility apparently took very slight interest in the possession of Normandy; for the re-conquest of which no efforts ever appear to have

But it was, above all, the blending of the Franco-Norman and the Anglo-Saxon nationalities, by this time complete, which had imperceptibly undermined the foundations of absolutism. For five generations they had now lived together under one Church, one kingdom, one administrative system, enjoying peace in common, and suffering equal oppression. The period of sword law under Stephen, and still more the ecclesiastical controversy with Thomas Becket, had at times elevated other antagonism above the national dissension. Parochial and family life had made intermarriage between the Angli and Francigenæ a daily occurrence. Under the strong political and ecclesiastical power a new insular national culture became matured, which through the separation of Normandy from England developed its own characteristics. In this new creation the Saxon element predominated, not merely in numbers, but in those peculiar attributes of character which the Anglo-Saxons retained unchanged in their family life, their manners, and their language. The sober, moral earnestness of this family life, in contact with the brilliant and volatile nature of the Franks, proved the stronger of the two elements; and finally in Church and State, in the community, and in the family, assimilated to itself the Frankish character until, in spite of a continuing difference in language and in class ideas, it became once more predominant in the nation. The greater portion of the powerful classes in the country were indeed still by name and descent Francigenæ; but with each successive generation, the population of the British Isles became more and more consolidated into the form of a nation Germanic in character.**

been made. The powers of resistance displayed by the Crown vassals certainly seem to have been strengthened by the spirit of knighthood, and by the sympathies of the under-vassals and freeholders. But custom knew no other than a royal authority in the feudal militia, and that body easily became disorganized under a marshal of their own choosing. The scattered position of the military fiefs, and above all the want of financial means, rendered a lasting resistance impracticable. Hence can be explained why the barons, after a few months' struggle, were no match for the financial power of the King, with his paid soldiery and garrison troops. The increasing importance of the freeholders and cities has been already adequately estimated by Spelman "on Parliaments" (*cf.* Peers' Report, i. pp. 32, 35, and below, cap. xix.).

** The most significant new basis

It is these elements that are comprehended in the world-renowned events of the 15th June, 1215, which, under the name of "Magna Charta," are rightly regarded as completing the foundation of the English constitution. From the moment when John in his ecclesiastical dispute had collected together the whole military array of his realm to oppose the King of France, the consciousness of their relation to this monarchy

is doubtless the reconciliation of the national antipathies, to which the often quoted testimony of the "Dialogus de Scaccario" refers: "*Jam cohabitantibus Anglicis et Normannis et alterutrum uxores ducentibus vel nubentibus, sic permixtæ sunt nationes, ut vix discerni possit hodie, quis Anglus quis Normannus sit genere.*" Although in former times the national contrast of the Franco-Norman and English nationalities was perhaps overrated, yet the recent researches of Freeman (vol. v. Appendix W) perhaps, on the other hand, go too far in weakening and underrating the national contrast. "What Englishmen suffered from was mainly that irregular often undesigned oppression, which must take place when the laws of a conquered people are administered by their conquerors" (Freeman, iv. p. 14). "The success of William's invasion was a distinct triumph of one language, one mode of warfare, of one social and political system over another" (Freeman, iv. p. 17). The point of view insisted upon by Stubbs is correct, that the Norman monarchy, with laudable consistency, upheld the legal equality of the two nations, and that the pressure of the Norman nationality was principally owing to the Normans having taken possession of the high offices in the State and the great landed properties. The national contrast is crossed by this social one, but the national antipathies in consequence were rather embittered than mollified. A deeply rooted national dissension is proved not only by credible historical evidence, but above all by the uniform bearing of the Anglo-Saxon population at every attempt at insurrection by Norman great vassals; it is evidenced also by the decomposition of the constitution of the counties, which was everywhere visible, owing to internal dissensions, that could only be rooted in the national element. Absolutism was founded on these dissensions alone, and that it had taken root there is shown by the stability of the tendency to freedom from the moment of the blending of nationalities. In spite of all changes which the positions of power and party underwent in the following generations, this progress remained irrevocable; it consolidated itself in each successive generation, and triumphantly led the emancipation of the estates to further victories, up to the close of the Middle Ages. But in this blending the Germanic element had become the preponderating one, just as Magna Charta did not arise from the Franco-Norman, but from this national spirit. It was finally the toughness of the Saxon nationality which saved England's freedom. Whilst on the Continent Romans and Romanized Celts crowded to the courts of the magnates, the Saxon Thanes and peasants remained apart during these hard times, and shut themselves within their fortified farm-houses. Whilst the adaptive Scandinavian Normans in their settlements in Normandy had, after a few generations, come to use the language of their wives, and had become Frankish in manners and customs, in England the Norman element which had become French had not, in spite of the position of the ruling class which it had held for centuries, been able to introduce one-tenth of its foreign words into the English tongue as it is spoken to-day, or more than three words into the English Lord's Prayer (Hickes, Thesaur., Pref., p. vi.). Finally, it was the qualities in character which decided the issue in the question of nationality.

awoke in the breasts of the people. The papal legate had laid before the King proofs of the understanding subsisting between the barons and King Philip, and had thus in the first instance procured the humiliating submission of John to the papal throne, which threw the country into greater agitation than the interdict. At the meeting of the magnates in St. Paul's on the 25th August, 1213, a confederacy was formed, which, supported by a great proportion of the prelates, advanced slowly in its claims against the Crown. It was not until towards Easter, 1215, that an army collected at Stamford, consisting of two thousand knights, with a numerous following on horse and on foot, amongst whom were some great feudatories, but especially younger sons of the first families in the land. They chose Robert Fitzwalter as Marshal of the "army of God and of the Holy Church," obtained release from their oath of fealty from the canons of Durham on the 5th of May, but only succeeded in gaining a firm footing against the King and his garrison troops when, in league with the citizens of London, they had won that great fortified place. In this crisis negotiations for peace are made upon the meadows of Runnymede (15th to 19th June, 1215), in which the King, with his small retinue upon the one side, and the rebellious barons in full martial array upon the other, treat together, the Earl of Pembroke acting as mediator. The barons (perhaps Archbishop Langton himself) had originally drawn up in formal articles the grievances of the country, articles which, revised and completed, were recognized by the King by the affixing of his great seal, and being then formally issued, were raised to a royal charter.***

*** The authentic versions of and legal treatises upon Magna Charta have not been prepared with quite that care which would have been expected from the importance of the subject. Jurisprudence, which is always slow in dealing with political questions, paid for a long time but little attention to the charter. The law books of Bracton, Britton, and Fleta scarcely touch upon it incidentally; its practical judicial effect demanded a previous specialization through the long series of Acts of Parliament which have proceeded from its fundamental principles. It was not until after the days of the Stuarts that the science of jurisprudence did justice to Magna Charta, more especially in the restoration of the authentic text. The ori-

Magna Charta leads us back to the details of the Norman administrative law, so that the sketch I have hitherto given will also serve as a commentary to it. To begin with, however, the relations subsisting with the Church must be especially remarked. Only in close alliance with the English prelates were the barons able to wage war against the monarchy. The charter granted in former days touching the freedom of ecclesiastical elections (p. 240) was accordingly confirmed, and was to be faithfully adhered to. The "separation" of Church and State was still popular, as being opposed to absolutism; and neither the baronial class nor the English population thought of interfering with the position the Church had now attained. The articles of Magna Charta accordingly only lay down legal limitations of the secular authority as to which the order in which we have hitherto considered them appears applicable and convenient.

ginal document has been described by Blackstone ("The Great Charter," pp. xv., xvi). It is preserved in the British Museum (cf. Lappenberg-Pauli, iii. 424). Of the copies which were circulated by the barons only two have been found by the Record Commission, at Lincoln and at Salisbury; the first is taken for the text in Rymer, i. 131, and in the "Statutes of the Realm," i. 7 (Lappenberg-Pauli, iii. 436). Of the treatises three may perhaps be particularly mentioned:—

(i.) Blackstone, "The Great Charter" (Oxford, 1759 fol.), in which the course of the editions and the confirmations until the end of Edward I.'s reign are described with critical care. Then follows the reprint of the thirty-nine articles, upon which Magna Charta was based (pp. 1–9); then the correct text of the charter drawn up in sixty-three articles, 15th June, 1215 (pp. 10–24). To these are added the more important later versions, especially Magna Charta, A.D. 1217, 9 Henry III.

(ii.) A legal commentary is given by Coke (Inst., ii. pp. 1–78) on the articles of the charter as contained in the version of 9 Henry III. Some serviceable additions are contained in Barrington's "Observations on the more Ancient Statutes, from Magna Charta to 21 James I." (5th edition, 1796).

(iii.) An excellent reprint, now readily accessible, is given by Stubbs in his "Select Charters," consisting of the draft made by the barons (p. 289), the first version (p. 296), and the later alterations in the text under Henry III. (pp. 339, 344, 353, 365, 377).

In the ordinary editions of the "English Parliamentary Statutes," Magna Charta is only given in its later form (9 Henry III.). The official edition of the "Statutes of the Realm," which was issued by the Record Commission, gives the original documents; the most important of them with the addition of a *fac-simile*. The arrangement which is appended follows the development of the Sovereign rights, but in detail the sequence of the articles. An arrangement of the articles according to ranks and classes for which they were framed is given by David Rowland ("Manual of the English Constitution," London, 1859, pp. 50–60).

I. The first group of articles deals with the **legal limitations of the feudal military power,** principally viewed from the financial side; touching wardship, marriage, and the amount of reliefs and aids. Herein the ancient right of the Crown was recognized, but an unfair interpretation of it for fiscal purposes, and excessive claims, were prevented by a reduction to fixed payments. The *relevium* of the estate of a *comes* was fixed at £100 in silver, that of a Crown vassal at 100 marks in silver, and that of the single knight's fee at 100 shillings (Art. 2). The feudal guardian of minors is to have his proper income and services; he is not to lay waste the lands, but rather to keep them in condition (5, 6). Feudal heirs are to be married suitably to their rank (7). The widow is to have her dower, and must not be compelled to marry again (8, 9). Arts. 12 and 14 (dealt with below, V.) relate to the imposition of *scutagia* and *auxilia*. No mesne lord is to be allowed the right of taking other *auxilia* from his under-vassals than a proper aid in the three ancient customary cases (15). No one shall be constrained by distraint to do more services for a knight's fee or another free fee than he was bound to do formerly (16). No governor of a castle shall compel a knight to pay money for the castle guard, if he performs it in his own person, etc. (29). Moreover, all these regulations are to be recognized by the feudal lords as binding on them with regard to their men (Art. 60); "*Omnes autem istas consuetudines predictas et libertates, quas nos concessimus in regno nostro tenendas, quantum ad nos pertinet erga nostros, omnes de regno nostro tam clerici quam laici observent quantum ad se pertinet erga suos.*" A great portion of these feudal articles is in accordance with the old promises of the charter of Henry I., but differs from the latter in its much more determinate framing, and providing for the sub-vassals, and for proper execution. (1)

(1) *Legal limitations of the feudal military power* are especially contained in the articles 2–8, 12, 14, 15, 16, 26, 29, 43, 60; "*Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum et primogenitum filium nostrum militem faciendum et ad filiam nostrum primogenitam semel maritandam, et ad hoc*

II. **Legal limitations of the judicial power.** (i.) Concerning *civil justice:* the hearing of ordinary civil actions shall no longer follow the royal court, but shall be held in some certain place (Art. 17). The civil assizes shall be held once a year in every county by itinerant justices (18, 19). None are to be appointed *justiciarii*, county and local justices, who are not versed in the law of the country, and willing to duly observe the same (45). The arbitrary and disproportionate fees exacted for judicial proceedings are to cease: "*nulli vendemus, nulli negabimus aut differemus rectum vel justitiam*" (40); and as a fact, from that time the great fines derived from actions, and the sums paid for stay of judgment disappear from the Exchequer accounts. (ii.) Concerning *criminal justice:* no *Vicecomes*, no constable of a castle, or local bailiff of the King, shall from this time forward exercise in his own right criminal jurisdiction and decide *placita coronæ* (24); it is manifest again from this how popular the centralization of justice at the expense of the county and town bailiffs had become.

But the most essential clause, which also relates to legal procedure, is the fundamental article 39: "*Nullus liber homo capiatur, vel imprisonetur aut dissaisiatur aut utlagetur aut exuletur aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ.*" This is the assurance of the continuance of the *Leges Eduardi*, of the traditional judicial constitution with its legal protection accorded to person and property. By "*judicium parium*" is meant, not such a jury as in the year 1215 existed only in civil procedure, in the elements of a *jurata*, but *judgment by peers*. The addition of "*vel per legem terræ*" runs in one copy "*et per legem terræ*" ("*vel*" in the language of this time often occurring for "*et*"); accordingly, this clause deals with the frequently repeated assurance of the traditional law of the land and judicial procedure; but

non fiat nisi rationabile auxilium" (12); summons of all Crown vassals to the *commune consilium* in such cases (14, below, note 5). All these *libertates* were also to be observed by the feudal lords towards their subvassals (60).

the assurance is more strictly framed, and demanded in its present shape by the Norman magnates themselves, and accordingly guaranteed again by them to the *liberi homines* of the realm. (2)

III. **Legal limitations of the police power.** The main point lay in the system of amerciaments; for by the imposition of police fines every judicial protection of person and property could be rendered illusory. Magna Charta (20), directs the following provisions against such abuses: (i.) The police fines shall correspond in amount to the magnitude of the offence: "*Liber homo non amercietur pro parvo delicto nisi secundum modum delicti, et pro magno delicto amercietur secundum magnitudinem delicti.*" (ii.) The execution in respect of police fines is to take place with the *beneficium competentiæ*, in such a manner that every *liber homo* should save his necessary subsistence (*contenementum*), the merchant his merchandise (*marcandisa*), and the villein his implements of husbandry (*waignagium*). (iii.) For the condemnation of any to an amerciament, a co-operation of the "good men" of the neighbourhood shall be necessary; that is to say, a summary judicial proceeding: "*et nulla predictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto.*" This comparatively immaterial and often disregarded provision cuts at the root of an arbitrary police power, and of such regulations as are contrary to the constitution; and in

(2) *Legal limitations of the judicial power* are comprised in the clauses 17–19, 24, 34, 38–40, 45, 54, as follows:— "*Communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco*" (17); "*nullus Vice-comes, constabularius, coronatores vel alii ballivi nostri teneant placita coronæ nostræ*" (24); "*nihil detur vel capiatur de cætero pro brevi inquisitionis de vita vel membris, sed gratis concedatur et non negetur*" (36). "*Nullus liber homo capiatur vel imprisonetur*," etc. (39 v. above). This essential clause had, moreover, a precedent; for already during the conflict between the regency appointed by Richard I. and the barons, a similar assurance had been mutually agreed on as to the proper course of justice: "*Sed et concessum est, quod episcopi, et abbates, comites et barones, vassassores et libere tenentes non ad voluntatem justiciariorum vel ministrorum Domini Regis, de terris et catallis suis dissaisientur, sed judicio curiæ Domini Regis secundum legitimas consuetudines et assisas tractabuntur vel per mandatum Domini Regis.*" "*Nulli vendemus, nulli negabimus aut differemus rectum aut justitiam* (40). Article 42 provides that the county court shall be held every month, the sheriff's tourn twice a year: the yearly sittings of the itinerant justices are to be reduced from four to one.

the course of the period in which the estates of the realm were formed, was thoroughly carried out by the co-operation of parliament. A writ, "*de moderata misericordia*," carried out in principle the appeal to legal process against police fines and administrative executions even in the local courts. A fundamental rule of liberty to move from place to place, to which the clergy also could appeal in their intercourse with Rome, is contained in article 42: "*Liceat unicuique de cætero exire de regno nostro et redire salvo et secure per terram et per aquam, salva fide nostra, nisi tempore guerræ per aliquod breve tempus propter communem utilitatem regni, exceptis imprisonatis et utlagatis secundum legem regni, et genti de terra contra nos guerrina et mercatoribus, de quibus fiat sicut predictum est.*" (3)

IV. **Legal limitations of the financial power** are already comprised in the provisions touching the feudal power. Whilst those, however, are only in favour of the upper classes, a number of the hardships inflicted by the fiscal Government upon the freeholders and cities are next dealt with. As to the *auxilia* (properly *tallagia*) of the city of London, the same rule is to be applied as in the case of the aids of the feudal vassals (12). London, and all other cities, burghs, *villæ et portus*, are to have their "*libertates et liberas consuetudines*" (13); merchants their trade and traffic secure, and free from all arbitrary impositions and tolls (41). There shall be one weight and measure for the whole country (35). No city and no freeholder shall be compelled to build dykes and

(3) *Legal limitations of the police power* are contained in articles 20–22, 24, 32, 39, 42, 54, 56, primarily concerning the system of police fines: "*liber homo non amercietur pro parvo delicto nisi secundum modum delicti*," etc. (Art. 20, *vide* above). In the case of Crown vassals the following was added: "*Comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti*" (Art. 21). For the clergy cf. Art. 22, "*Nos non tenebimus terras illorum, qui convicti fuerint de felonia, nisi per unum annum et unum diem, et tunc reddantur terræ dominis feodorum*" (Art. 32). The rendering of illegal police fines null and void: "*omnia amerciamenta facta injuste et contra legem terræ omnino condonentur, vel fiat inde per judicium XXV baronum*," etc (55, 56). The carrying out of these principles was primarily the duty of the Exchequer and the King's court, as the courts of higher instance of the sheriff's tourn and the rest of the royal courts of record. For the manorial courts and other courts "not of record," in which the old customs still prevailed, in later times a special writ "*de moderata misericordia*" was framed, which enforced the uniform application of the principle. (Cf. Scriven on Copyhold, ii. 852, 853.)

bridges, except where such is a matter of ancient custom (23). Purveyance and compulsory carriage are only to be enforced against the freeholder in return for immediate payment, or only with the free consent of the owner (28, 30). Neither the King nor any royal officer or other person shall take the wood of any one for the royal castles or for other uses, except with the permission of the owner (31). Those living outside the forests shall not be summoned before the forest courts (44). The newly made forests shall be disforested (47). All abuses concerning forests, warrens, foresters, sheriffs, and their officials, shall be inquired into in every county upon oath by twelve knights of the shire, chosen by the "good men" of the same county (48). Common to both feudal vassals and *liberi homines* is also the assurance relative to the regulation of inheritances of personalty, and payment of debts, especially with regard to the *privilegia fisci* (26, 27). The articles concerning the treatment of the *debita judæorum* (10, 11) are derived from the province of administration of the Exchequer of Jews. On this side is apparent the considerate regard paid to the lower classes of the people, which may probably be attributed to the spiritual advisers. The liberties granted to the Crown vassals are extended, as a matter of course, to the relations of the private feudal lords *erga suos*. The limitations imposed upon taxations are extended at all events to the city of London. Conversely, the redress of the common grievances of the country, which principally proceed from fiscal oppression, in the first instance benefits the middle classes, but reaches upwards to the higher classes also. Military vassals and *liberi tenentes* stand side by side in such articles. Many clauses refer to all the *liberi homines*, without regard to the kind of property, and are so far beneficial to the villein tenants as well. A few clauses are directly framed in favour of the villein. (4)

(4) *Legal limitations of the financial power* are comprised in articles 9–11, 16, 25–33, 35, 37, 41, 43, 44, 48, 60, especially as to the more forbearing prosecution of fiscal claims (9), debts of Jews (10, 11), the restriction of the *auxilia* to the three old cases: "*Simili modo fiat de auxiliis de civitate*

V. **The legal sanction** of all these liberties and assurances is connected with a number of temporary provisions. But at the same time this sanction unites with other articles in forming the first foundation of a constitution by estates of the realm. The form which had been hitherto observed in the charters could not satisfy the barons, as the question of their irrevocability had not been settled in judicial practice. Hence they adopted the course of giving the charter, by means of a solemn oath, the character of a treaty of peace according to feudal custom: "*Juratum est autem tam et parte nostra, quam ex parte baronum, quod hæc omnia supradicta bonâ fide et sine malo ingenio servabuntur.*"

The charter thus received the character of a joint compact. But seeing that any oath taken by John was worthless, and could be remitted by the Pope, and that all the limitations of the Government which had been assured, were, as against the sovereign *curia* and the Exchequer, comparatively useless, the appointment of a national committee with recognized rights of resistance was added thereto, which, combined with certain previous articles, formed the parliamentary clauses of Magna Charta.(5)

London" (12); "*et civitas London habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras quam per aquas. Præterea omnes aliæ civitates et burgi et villæ et portus habeant omnes libertates et liberas consuetudines suas*" (13). Here can be clearly seen the influence of the city of London, which was allied with the barons, and which carried the subsequent clauses relating to trade, weights and measures, as well as a special clause against the weirs made in the Thames. "*Nullus distringatur ad faciendum majus servitium de feodo militis nec de alio libero tenemento, quam indè debetur*" (16). "*Omnes comitatus et hundredi, threthingii et wapentachii sint ad antiquas firmas absque nullo incremento, exceptis dominicis maneriis nostris*" (25). "*Una mensura vini sit per totum regnum nostrum et una mensura cerevisiæ et una mensura bladi*," etc. (35); touching the regulation of guardianships of the "*tenentes per feodifirmam, per socagium, per burgagium, per parvam serjanteriam*" (37); "*omnes mercatores habeant salvum et securum exire ab Anglia et venire in Anglia, morari et ire per Angliam tam per terram, quam per aquam, ad emendum et vendendum sine omnibus malis toltis per antiquas et rectas consuetudines*," etc. (41); a milder administration of the royal forest laws (44, 47, 48). The latter articles form the main contents of the later separate *charta de foresta*.

(5) The temporary provisions of Magna Charta begin with Art. 49–52, and then 55–59 61, 62. They deal with the restoration of the *obsides*, the removal of persons named from the royal prisons, the discharge of the foreign mercenaries, the restitution of lands seized *sine legali judicio parium*, the remission of illegal fines and amerciaments, the restoration of the lands in Wales, which had been torn from their possessors, the relations of England to

(i.) The committee of resistance was appointed in article 61 with the following provisions. Twenty-five barons (among them the mayor of London) who should fill all vacancies in their number as they occurred by co-optation, are to be elected as conservators of the charter, and are to pass resolutions according to majorities; and if the King breaks any article, four out of their number shall, on each such occasion, move before the King or chief justice that redress be made; and in case of refusal they may summon the *communa* (probably the whole of the vassals), and take from them the oath of obedience, "*et illi viginti quinque barones cum communa totius terræ distringent et gravabunt nos modis omnibus quibus poterunt, scilicet per captionem castrorum terrarum possessionum et aliis modis quibus poterunt donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et reginæ nostræ et liberorum nostrorum, et cum fuerit emendatum intendent nobis sicut prius fecerunt.*"

This clause is so far in harmony with the spirit of the feudal state of the Middle Ages, as it was based upon a mutual relation of feudal protection and fealty, that is, upon compact. The vassals thus give expression to the fundamental notion of their relation as it existed in Normandy and France, yet with certain important alterations. Whilst on the Continent the individual vassal regarded himself as judge of the question as to whether or no the lord had broken his obligation to protect him, and frequently for a trifling cause sent in his letter of challenge, here in England the nobility act as a corporate body. Only in their collective capacity, represented by definite organs, are the barons declared entitled to resist, but the feud of the individual against the monarch is in no wise sanctioned. As a fact, there is contained in this harsh article nothing more than a recognition of the feudal right of distress, which belongs to the King by virtue of the constitution, and which is conceded in return to the collective

King Alexander of Scotland, and a general amnesty: "*omnes malas voluntates, indignationes et rancores remisimus, omnes transgressiones factas occassione ejusdem discordiæ a Pascha a regni nostri xvi. usque ad pacem reformatam.*"

body of Crown vassals as against the King. The concession by agreement of the rights of distress was altogether so entirely consonant with the legal conceptions of the Middle Ages, that in this way the committee of resistance loses a portion of its apparently revolutionary character. (*a*)

(ii.) The second clause respecting the estates of the realm was intended to ensure a regular summons and right of assent of all the Crown vassals in two particular cases. Thus whenever an aid (*auxilium*) was demanded in addition to the three traditional cases of "honour and necessity," this is only to be done "*per commune consilium regni nostri*" (12); and this is to apply also to the *auxilia* of the city of London. In all cases, however, a *commune consilium* was to be convoked, whenever scutages were demanded instead of the feudal military services. To that *commune consilium* the barons were to be summoned in the following manner (Art. 14):—

"*Et ad habendum commune consilium regni de auxilio assidendo, aliter quam in tribus casibus predictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones sigillatim per litteras nostras. Et præterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes illos, qui de nobis tenent in capite, ad certum diem, scilicet ad terminum quadriginta dierum ad minus, et ad certum locum, et in omnibus literis illius summonitionis*

(*a*) The clause relating to the committee of resistance runs in the language of Art. 61 as follows:—"*et si nos excessum non emendaverimus, infra tempus quadraginta dierum, predicti quattuor barones referant causam illam ad residuos de illis viginti quinque baronibus, et illi viginti quinque barones cum communa totius terræ distringent et gravabunt nos modis omnibus, quibus poterunt, scilicet per captionem castrorum, terrarum, possessionum et aliis modis, quibus poterunt, donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et reginæ nostræ et liberorum nostrorum, et cum fuerit emendatum, intendent nobis sicut prius fecerunt. Et quicunque voluerit de terra, juret, quod ad predicta omnia exequenda parebit mandatis predictorem viginti quinque baronum, et quod gravabit nos pro posse suo cum ipsis; et nos publice et libere damus licentiam jurandi cuilibet, qui jurare voluerit, et nulli unquam jurare prohibebimus. Omnes autem illos de terra qui per se et sponte sua noluerint jurare viginti quinque baronibus de distringendo et gravando nos cum eis, faciemus jurare eosdem de mandato nostro, sicut predictum est.*" English jurists and historians are accustomed to make very inappropriate comparisons between this article, and the insolent resistance-clauses of the feudal lords of the Continent, the Constitution of Arragon, and the like, whereas article 61 of Magna Charta is both in form and spirit very different in character to the indecent violence of the continental vassals.

causam summonitionis exprimemus: et sic facta summonitione negotium ad diem assignatum procedat secundum consilium illorum, qui præsentes fuerint, quamvis non omnes summoniti venerint."

The English barons in arms, allied with the Church and the city of London, and with the consent of the country never laid claim to more than this, even when at the height of their success. They claimed no right of assent to the issuing of royal ordinances, no right of summoning a *cour de baronie*, no conventions assembled to deal with the grievances of the nation or generally with the voting of taxes; but only a right of assenting to two positive alterations in the legal conditions of feudal tenure. (*b*)

The possible germ of a special peers' jurisdiction was contained finally in—

(iii.) The clause dealing with amerciaments (21): "*comites et barones non amercientur, nisi per pares suos et nonnisi secundum modum delicti,*" the phraseology of which reminds us of the peers' court which arose in later times. Since a legal distinction between the greater and lesser vassals had not as yet been drawn, there was actually contained in this clause nothing more than a general promise of the traditional administration of justice, nothing more than the "*judicium*

(*b*) The clause concerning the summoning of the *magnum consilium* for extraordinary *auxilia*, and for the purpose of fixing the scutages, has, like other passages, been much distorted by political parties. This article is only directed against the arbitrary taxation of John, against the raising of the hide-tax from two to three shillings at the commencement of his reign, against the raising of the scutage from £1 to two marks, and against the continued exaction of it without any occasion for a campaign, and above all against the raising of an impost upon the personal property of the Crown vassal (1203), in direct opposition to the feudal compacts and the most solemn assurances of his predecessors on the throne. Only in those cases which contain a positive alteration in the legal conditions of feudal tenure is a right of assenting claimed. Not a word is said of assenting to the promulgation of royal ordinances or laws; not a word about a right to summon a *cour de baronie* for the exercise of a jurisdiction over the Crown vassals; not a word about an ancient national assembly for dealing with the national grievances, or for the voting of taxes. As every investigation in detail destroys the favourite tradition of a "feudal parliament in arms," of a permanent feudal *curia*, and of an estate of the realm formed by "the proud barons of the twelfth century," so are these circumstances connected with Magna Charta fatal to the general conception of the *Curia Regis* which antiquaries have imagined.

parium" which in Art. 39 had been assured to all free men of the realm. (*c*)

Magna Charta accordingly contains much less of formal constitutional law than has been looked for in it. But it contains the leading traits of the English character and constitutional system The Norman magnates had now been compelled to make their choice between the island and the Continent. In England they could not shelter themselves against the monarchy behind the walls of their castles, but were obliged, as individual resistance was impossible, to break through arbitrary power in a collective body, making common cause with the clergy, and backed up by the sympathies of the people, and to win for themselves and the people common rights and guarantees against such despotism, and thus base the constitution primarily upon personal liberty, and upon a uniform legal protection accorded to person and property. This nobility, which had for generations been the first to bear the oppression of the absolute monarchy, and the burdens of the state, had learned to sympathize with the people's wrongs, and thus began to realize its vocation of placing itself at the head of the nation in the new constitution that was being formed; in this sense Magna Charta was also a pledge of the reconciliation of the classes. Its origin and its confirmations kept alive for centuries the feeling of the community of certain fundamental rights for all classes, and the consciousness that a nobility cannot possibly assert rights and liberties without also guaranteeing to the weaker classes their personal liberty. Since the right of property, and the family rights of the *liberi homines* had been for once and all uniformly framed, since a separate right for nobles, citizens, and peasants, was no longer possible, from this time onwards, all struggles are undertaken only with the object of securely restraining the personal government; and as long as the quarrel takes this direction, so long do we find people and clergy on the side of the nobles. Upon the foundation thus won further efforts could not tend

(*c*.) In this sense this clause was also understood in practice (below, p. 315).

towards asserting exclusive privileges, but only towards regulating the political sovereign rights according to law, and thus gaining a constitutional co-operation. By Magna Charta English history irrevocably took the direction of securing constitutional liberty by administrative law. In this sense Hallam's words are true: "The Magna Charta is still the keystone of English liberty. All that has since been obtained is little more than a confirmation or commentary; and if every subsequent law were to be swept away, there would remain the bold features that distinguish a free from a despotic monarchy."

But because the charter forms the beginning of living constitutional rights, that is of enforceable rights, protected by permanent institutions, England has ever again recurred to it, under the best as under the worst monarchs. The place of the former "confirmation of the laws of Eadward," is now taken by the ever-repeated demand of the people for a "confirmation of Magna Charta." Its practical sense laid such great weight upon written documents, that before the close of the Middle Ages this confirmation had been thirty-eight times demanded and granted.†

† There is probably no country and no petty state in Europe which has not, at some time of pecuniary or national distress, received its Magna Charta; but these long catalogues of grievances and promises were as a rule speedily forgotten. Nothing but its practical aim of regulating the sovereign rights, and class and private law, could have availed to make the English Magna Charta the living foundation of the constitution, and could have given it the energy requisite for creating hundreds of later parliamentary statutes. The practical knowledge of political government,—a knowledge confined in those days to the temporal and spiritual magnates of that time, and which manifested itself in the formation of the official nobility after Henry I., is remarkable. The most important difference between this Magna Charta and those of the Continent lies in its aiming to secure real legal protection for all classes of the people, without attacking or diminishing the political sovereign rights, which had been already developed. It proves to us in this direction, how personal and political liberty can only arise and become permanent through moderation and public spirit, and not through narrow-minded separation of the upper classes from the lower. In this sense Pitt once spoke those words so often quoted in the Upper House: "To your forefathers, my lords, the English barons, we owe our laws," etc. (*cf.* Mackintosh, History, vol. ii., *sub anno* 1215).

CHAPTER XIX.

The First Attempt at a Government by Estates of the Realm.

In scarcely any other European country did the parliamentary constitution have such a slow and difficult birth as in England. The principal cause of this difficulty, national disunion, had ceased, it is true, in the thirteenth century. But in the meantime the political government had taken an exclusive form, which did not easily admit of the insertion of a corporate estate. In an early matured development the monarchy had brought its financial, military, judicial, and police organization into a bureaucratic system which could only be controlled by a single will; and which, in case of disunion in this will, fell immediately into confusion. The prelates and the temporal lords themselves had felt this fact. Hence Magna Charta did not claim any immediate participation of the estates in the executive, but merely insisted on legal limitations to the exercise of royal sovereign rights, and in an extreme case, demanded the suspension of the personal government until the grievance was redressed.

The result confirmed only too strongly the necessity of this modest beginning. The representative committee of twenty-five barons was chosen; their names have been preserved to us, as also the writs for administering the oath to the "*communitas.*" King John had, however, only accepted Magna Charta because he never intended to keep it. The charter was nowhere registered, and would have been suppressed, had the barons not circulated copies of it over the country

for preservation in churches and monasteries. The Pope, intent only on the interests of the power of the Church, on demand immediately released the King from his oath. A Bull disapproved and condemned the whole proceeding, described the agreement as an illegal, unauthorized, and disgraceful compact, and declared the barons to be worse than the Saracens. The monarchy had been but taken by surprise, and still had the upper hand, even in the person of an unworthy monarch. Accordingly, John withdraws, and being lord of the financial power and the castles, collects by means of the preponderating power of the royal treasury a mercenary army, for which the nobility of the country is no match, even in a righteous cause. Despairing of the issue, the insurgents call a French prince and a foreign army to their aid; a desperate struggle begins, in the course of which John suddenly dies, on the 17th October, 1216.*

His legitimate successor was a child of nine years of age. For the first time since the Conquest the personal government was in the hands of a minor. In that stormy time the great Earl of Pembroke undertook the government, as Protector. It was the first instance in English history of a statesman at the head of a victorious party being summoned to apply conditions such as those proclaimed in Magna Charta, which he himself, although he had not drawn them up, had

* Immediately after the granting of Magna Charta, John despatched an embassy to the Pope, to get quit of his oaths and promises. Already on the 24th August, 1215, the condemnatory Bull was published. The Pope, as supreme head of the Church, and feudal suzerain, repudiates the actions of the barons, and declares all that has been done not binding (Rymer, i. 2, p. 67 *seq.*), and shortly afterwards proceeds to excommunicate the barons. The dispute now took a very unfortunate course, as the barons lacked both money and unity. It was not until the landing of Prince Louis on the 21st May, 1216, that the struggle took another turn, before the final issue of which John died. The circumstances, which point to a possible, though not probable, death by poison, have been in modern times again investigated by R. Thomson, "On Magna Charta" (1829, pp. 535–554). With John's death the situation became so much changed, that a number of the barons immediately forsook the cause of the French prince; at the council held at Bristol on the 11th of November, 1216, the papal legate releases the barons from their oaths to the prince, and then occurs the first confirmation of the charter (1 Henry III.), with the omissions which Blackstone has enumerated, pp. xxix.–xxxi. (see also "Select Charters," p. 399). For the French prince matters now take such a turn, that he withdraws with the tolerably favourable articles of peace of the 11th September, 1217.

approved and accepted in his capacity of mediator between the conflicting parties. As a matter of fact, at the Council of Bristol, with general approbation and even with that of the papal legate, Magna Charta was confirmed, though with the omission of certain articles. It runs "*Quia quædam capitula in priore charta continebantur, quæ gravia et dubitabilia videbantur, scilicet de scutagiis . . . placuit supradictis prelatis et magnatibus ea esse in respectu quousque plenius concilium habuerimus.*"

Besides the fine bold features of a national spirit that was awaking to liberty, the charter displays the first picture of an immediate contrast between State and society in an incomplete constitution, and the difficulty of reconciling this contrast. To this difficulty just those three articles were sacrificed, which contained the first basis of a constitution of estates of the realm.

(i.) Article 61 dealt with the formation of a national committee to uphold the provisions of the charter. The committee of resistance had been called into being, but its appointment had resulted in a civil war, in which the barons had paid allegiance to a foreign prince. The first act of their resistance was thus marred by a blot, which in the changed condition of things after John's death at once led to dissensions among the barons themselves. The article accordingly was tacitly allowed to drop as rendered nugatory by the disappearance of the cause. In the following decades the party of the nobles involuntarily returned to the practice of the committee of resistance; it was reserved for the following period to frame a constitution, which was able to maintain itself without the rude help of violence.

(ii.) The clauses dealing with the voting of scutages and extraordinary aids by a *commune concilium regni* (Arts. 12 and 14) were omitted, and also their extension to the *auxilia* of the city of London. The barons, under the Protector, now stood in the room of the King, and could not well resign the many fertile sources of income for the carrying on of the Government, arising from demesnes, forests, and the protection of

Jews. But the convocation of a tax-imposing assembly (in the meaning of article 14) seems to have appeared impracticable to the Protector and his friends, and for very simple reasons. The ever-recurring phenomenon, that the first constitutional ideas, which immediately proceed from a resistance to the political power, are incapable of realization, is thus confirmed. As the convocation of a national council was only to take place on account of the *scutagia* and *auxilia* of the King, only vassals who paid to the Crown could have been thereby intended, that is, the *tenentes in capite*, but of them every one. But were then greater and lesser Crown vassals to be summoned without distinction, whilst the great lords were still loth to concede to the hundreds of squireless knights and petty possessors of plots of land, a real equality with themselves? The great vassals could not exclude their *pares* in feudal possessions from that right of assenting; and yet in the customs of the past no ground was discoverable for allowing them a curtailed right of voting. A return was accordingly made to that old custom of court-etiquette, according to which, the distinguished lords had been hitherto summoned to court by letter, "*sigillatim per litteras nostras.*" If all the rest were only summoned collectively by the *Vicecomes*, it might perhaps be presumed that the majority of them would not appear. But still a parliament after the Polish fashion would have arisen, with hundreds of representatives consisting of petty possessors of single small estates. Still less inclined would the great prelates feel to deliberate on an equal footing with the lesser abbots and barons, or with an excessive number of lesser knights. Hence can be explained, why the assembly thus projected was never brought together, and why that clause was never comprised in any later promulgation.

(iii.) The clause concerning the amerciaments of the barons *per pares suos* (Art. 21) was indeed retained in word; but was immediately interpreted by practice to mean, that those amerciaments should be recognized in the Exchequer or in the King's Court, *per barones de scaccario, vel coram ipso rege*

(Bracton), or *coram consilio regis*, as it runs in a writ of 3 Hen. III. The regency of the barons itself thus acknowledges that the law has been satisfied if the matter has been referred to a commission consisting of vassals of the Crown—just as the *judicium parium* has in general been hitherto treated. The result was the concession of a legal hearing before the supreme tribunal.

In like manner the further course of the constitutional struggle proves the truth of the remark, that the most righteous resistance to despotism, and the noblest aspirations of a national spirit, are not sufficiently powerful to immediately found political liberty, but that continuous labour and a positive reformation of the political system are needed; and to these Magna Charta was only able to give the impulse. After some degree of tranquillity had been restored, a second confirmation of the Great Charter took place in the autumn of 1217, with the omission of the clauses referring to the estates, but with the grant of a new *charta de foresta*, introducing a vigorous administration of the forest laws. In 9 Henry III. Magna Charta was again confirmed, and this is the form in which it afterwards took its place among the statutes of the realm.**

** As to the confirmations of Magna Charta, a second confirmation takes place (2 Hen. III.), again with some alterations, which are classified by Blackstone, xxxvi.-xxxviii. (*cf.* Charters, 344). Among the additions is a clause relating to the removal of the adulterine castles of the barons and another against alienations to mortmain. The new confirmation takes place in 9 Henry III., on the 11th February, 1224, again with certain changes (Charters, 353). The admission of the last-named version among the English collections of statutes is so far correct, as from this time onward no further changes were made in the text. All later confirmations refer to the text as thus established. Some mistakes arose purely from the fact that it was not the original document of 9 Henry III. (Blackstone, 60–67) that was copied, but that the text was taken from an *Inspeximus* under Edward I. In the February of 1226 Henry III. undertakes nominally the government in person, without confirming Magna Charta afresh (*cf.* below, note 1). Blackstone, however, does not speak of this as a revocation, but only says: "The King is said to have revoked all the charters of the forest" (Matth. Paris). At the confirmation of 49 Henry III., 1264, when Henry was the captive of the barons, the clause touching the committee of resistance (Art. 61) was again adopted into it, with the omission even of the security reserved to the royal person and family; without, however, after the King's liberation, any notice whatever being taken of it. From 28 Edward I. until the latest confirmation (4 Hen. V.) twenty-nine resolutions were passed by Parliament confirming the charter, of which not less than fourteen were in the reign of Edward III.

Two years later, Henry III. personally assumes the reins of government at the Parliament of Oxford (1227), and begins his rule without confirming the two charters. At first the tutorial government still continues, which had meanwhile, even after the death of the great Earl of Pembroke (1219), remained in a fairly orderly condition. The first epoch of sixteen years of this reign must therefore be regarded purely as a government by the nobility under the name of Henry III. The regency had succeeded in removing the dominant influence of the Roman Curia by the recall of the papal legate, Pandulf, to Rome (1221), and in getting rid of the dangerous foreign mercenary soldiery (1224). To raise an extraordinary revenue by means of aids and scutages, conventions of prelates and barons were at this time repeatedly summoned; not indeed according to the letter of Article 14 of the charter, but in such a manner, that according to the discriminating judgment of the regency in conjunction with the prelates, the most illustrious members of the barony were summoned in comparatively large numbers, who then, after some discussion, granted the subsidies demanded. (1)

(1) The general history of this period has been impartially written by Lappenberg-Pauli, iii. p. 489–875. Compared with the older descriptions, the Peers' Report on the dignity of a Peer contains the most sober criticism. An authentic digest of the information respecting 135 *concilia*, and similar assemblies under Henry III., has been given by Parry ("Parliaments and Councils," pp. 24–49). For the first epoch of sixteen years the following events must be regarded: In 2 Henry III. (Council of St. Paul's): second confirmation of Magna Charta, for which the prelates, earls, barons, knights, "*et libere tenentes omnes de regno*," vote a fifteenth. In 9 Henry III. (*curia* of Westminster, 25th December, 1224): solemn confirmation of the two charters, combined with the voting of a fifteenth. In 11 Henry III., January, 1227 (council of Oxford): the King personally assumes the Government. "The King declares himself of age, and by his own authority cancels the two charters, as made and signed when he was not his own master, and on the ground he was not bound to keep what he was forced to promise" (Parry 27 quoting Matthew Paris, Hody, 304). The correctness of this assertion, which has not been otherwise confirmed, is however rightly doubted, as the government by the nobles, which still continued, had certainly no interest in setting aside Magna Charta. In 15 Henry III. (*colloquium* at Westminster): an *auxilium de quolibet scuto* was demanded. The secular magnates consented; the prelates asserted that ecclesiastical persons were not bound to submit in this matter to the resolutions of laymen. The aid was, however, granted after a prorogation a few months later. In 16 Henry III. (7th March, 1232, *colloquium* of Westminster): an *auxilium generale* was demanded. The temporal Crown vassals declared that they were not bound to any aid, as they had done personal military ser-

With the disgraceful dismissal of the chief justiciary, Hubert de Burgh, there begins a second epoch of a personal rule of Henry III. (1232–1252), which for twenty continuous years, presents the picture of a confused and undecided struggle between the King and his foreign favourites and personal adherents on the one side, and the great barons, and with them soon the prelates, on the other. Untaught by the evil experiences of favouritism shown to foreigners under Stephen and John, the weak and frivolous King put himself at once entirely in the power of foreign favourites. The conduct of the business of the State by Bishop Peter des Roches (of Poitou), called forth a storm of indignation among the temporal magnates. At the *colloquium* at Oxford (17 Henry III.), the earls and barons refuse to appear in person, and declare "that they will never obey the summons of the King, but will choose a new King, unless he dismisses the Bishop of Winchester and the lords from Poitou." When on the third summons the barons appeared armed, the King declared sentence of banishment and confiscation of their estates. At the next *colloquium* at Westminster, the Primate threatens the King with excommunication unless he changes his mode of government. The King on this occasion gave way; he dismissed the Bishop of Winchester and the objectionable counsellors, and declared an amnesty with the refractory barons; and then began for a few years tolerably friendly relations with the magnates, who still continued to grant the necessary supplies. (2)

vice out of the kingdom. The prelates gave the evasive answer, that many of their invited members were not present. On the 14th September (*colloquium* of Lambeth), however, the grant of a subsidy was made, in the name of the clergy, and the earls, barons, knights, and *liberi homines et villani* (Foedera, 16 Hen. III.).

(2) The authoritative precedents of this period are: In 19 Henry III. a council of the prelates, barons, and "all other Crown vassals," who vote a considerable *auxilium* (Close Rolls, 19 Hen. III.). In 20 Henry III. (20th January, 1236), *curia* of Merton, at which the *provisiones*, *assisæ*, or *statuta* of Merton are resolved by the spiritual and temporal barons present, "which have been from time immemorial considered as the oldest act of statute law" ("Parl. History," i. 32; Coke, "Inst.," ii. 96). The Peers' Report (i. 460) acknowledges that the authority of a small number of barons so summoned, must be still considered as sufficient for legislative acts. The enactment itself calls itself a "*provisio*;" the name often used at an early epoch "*Statuta*," is often ex-

But the incapacity and the incorrigible frivolity of Henry III. very soon aggravate his position. The King's uncle and his relations again form a court government, his French kinsmen seize upon the great offices and fiefs; and in order to obviate the probable opposition of the magnates to the ministers of the Crown, the great offices of State begin to be left unoccupied, the central administration being conducted by office clerks. In this critical time one special incident again occurs, a confirmation of Magna Charta. In 21 Henry III. the King finds himself, in consequence of pressing money embarrassments, again compelled to make a solemn confirmation of the charter, in which once more the clauses relating to the estates are omitted. Shortly afterwards, as had happened just one hundred years previously in France, the name "*parliamentum*" occurs for the first time (Chron. Dunst., 1244; Matth. Paris, 1246), and curiously enough, Henry III. himself, in a writ addressed to the Sheriff of Northampton, designates with this term the assembly which originated the Magna Charta: "*Parliamentum Runemede, quod fuit inter Dom. Joh., Regem patrem nostrum et barones suos Angliæ*" (Rot. Claus., 28 Hen. III.). The name "parliament," now occurs more frequently, but does not supplant the more indefinite terms *concilium*, *colloquium*, etc. In the meanwhile the relations with the Continent became complicated, in consequence of the family connections of the mother and wife of the King, and the greed of the papal envoys. The foolish compliance of the King with all demands, and the waste of the pecuniary resources of the country in the vain endeavour to maintain the English influence upon the

plained by saying, that for the first time the publication of a formal decree of the realm had taken place; but the form and framing of the *Rotulus* had nothing unusual in it. It is rather simply the language of Normandy, according to which men gradually began to call the more important enactments, "*etablissements*," or *statuta*. In 21 Henry III. (council of Westminster), the prelates, earls, barons, *milites et liberi homines pro se et suis villanis*, grant a thirteenth of personalty. In 22 Henry III. (council of London), the magnates appear armed, and after long discussion the King promises on oath to carry on his government by means of a definite number of distinguished men. In 24 Henry III. (council of London) the bishops produce thirty articles against the King, relative to violations of Magna Charta, Hody, 320.

Continent, tended more and more to impel the spiritual magnates to head the opposition against the King and against the Pope. From the year 1244 onwards, neither a chief justice nor a chancellor, nor even a treasurer, is appointed, but the administration of the country is conducted at the Court by the clerks of the offices. The conventions of magnates met these proceedings by violent public complaints, refusal of subsidies, repeated demands that their counsellors should be appointed to the offices of State, and finally by an accusation of treason preferred against the justiciary, Henry de Bath. (2[a])

With the year 1252 begins a third epoch of this reign of fifty-six years (1252–1266), in which the King comes under

(2[a]) The important precedents in this period are: In 26 Henry III. (1242) a council was held at London, at which were present "*omnes Angliæ magnates.*" The royal writ for this assembly is important, as it contains the express summons to deal with State business; "*ad tractandum nobiscum una cum cæteris Magnatibus nostris quos similiter fecimus convocari, de arduis negotiis, statum nostrum et totius regni nostri specialiter tangentibus.*" After long discussion an aid for the war against France was refused, and a written protest sent in (Peers' Report, iii. Appendix I.). In 28 Henry III. (Council of Westminster Hall), prelates and barons deliberate separately. By common consent of both, a commission was appointed to draw up definite articles to be sanctioned by the whole assembly; which articles were to regulate the conduct of the King, the appointment to the great offices, etc. This joint declaration of the estates, however, was rejected by the King, and the assembly was prorogued. In the assembly when again convoked, the King promises to observe the liberties which he swore at his coronation (1220) to maintain. A *scutagium* of twenty shillings is voted for the marriage of his eldest daughter (Hody, 322). In 29 Henry III. the magnates refuse an aid for the campaign against Wales. In 30 Henry III. (1246), a great assembly was held at London, which is first called a *Parliamentum* in Matth. Paris, A.D. 1246 (*cf.* Rot. Cl., 28 Henr. III.). The next instance of the use of the term in an official document is 42 Henry III. (Peers' Report, i. 91, 99, 461). In 32 Henry III., a council at London refuses an aid, and presents a list of national grievances, which the King promises to redress. In 33 Henry III. (council of London) the magnates demand that they shall have a voice in the appointment of the chancellor, chief justice, and treasurer. At this time Henry III. endeavours by popular administrative measures to gain influence against the dissatisfied barons. He personally assembles the sheriffs in the Exchequer, commends to their protection the Church, and the widows and orphans; a villein is not to be distrained on for the debts of his lord, except in case of exigency; the conduct of the lords towards their tenants is to be watched over, and the latter are to be protected against excesses; the sheriffs are not to let the under districts in the hundreds and other bailiwicks at rack rent, etc. In 35 Henry III. an assembly was held in London at which the justiciary, Henry de Bath, was indicted on a charge of high treason. In 36 Henry III. at the parliament of Westminster the papal demand of a tithe from the manors of the prelates for the Crusade was opposed, on the ground that their grievances must first of all be redressed.

the dominant influence of the barons. Till then the discontented magnates had lacked a proper leader. They now obtained leaders in the powerful Earl of Gloucester, and the politic Earl Simon de Montfort, brother-in-law of the King. To the internal and external complications there now is added the foolish endeavour to gain the Crown of Sicily for the King's son. After long discussions the treaty for this purpose was concluded, in which Henry involved himself in serious obligations to the Pope. The incapable internal government had fallen into a chronic state of pecuniary embarrassment, whilst the estates of the realm refused to raise demands of hitherto unheard-of amount. The vacillation and faithlessness of the King, his incapacity to conduct the external and internal affairs of his realm, his refusal to choose any suitable counsellor, led the discontented magnates to revert to the idea of a protectorate or regency, such as had been carried on with tolerable success during the first sixteen years of the reign. They no longer hesitate to obtrude the leading officers upon the King. (3) Without calling in question

(3) The precedents in the third period are: In 37 Henry III., the clergy vote a tithe for the Crusade, the knights a *scutagium* for the campaign in Gascony. Both charters of liberties were again confirmed. In 38 Henry III. (27th January, 1254), a council takes place in London, with a formal summons to State business (*ad ardua negotia nostra*). The temporal prelates refuse a grant of money; the bishops and abbots promise an aid for the case of necessity, but only for themselves, and not for the rest of the clergy (Peers' Report, i. 93, 94). On the 26th April, 1254 (council of Westminster), under the regency, in the absence of the King, the magnates having bound themselves to follow the King to Gascony, *cum equis et armis*, the sheriffs are instructed, in like manner, to summon to service all the rest of the Crown vassals who possess twenty *libratas terræ in capite*, and to send in addition each two *legales et discretos milites* to the council. In 39 Henry III. (parliament at London), the King demands an *auxilium*. The estates claim strict adherence to the charters, and the appointment of the chief justice, the chancellor, and treasurer, who are not to be removed, "*nisi de communi regni convocati concilio et deliberatione.*" The assembly was prorogued. On its re-assembling, the magnates, on an aid being demanded for the war in Sicily, declared that the King had embarked on that affair, "*sine concilio suo et consensu baronagii;*" that they had not all been summoned according to the provisions of Magna Charta, and that they would not therefore give any answer, and grant any aid without the co-operation of the rest. In 40 Henry III. (parliament at Westminster), the magnates and clergy repeatedly refuse an aid for the war in Sicily. In 41 Henry III. (parliament at London), the King, on his promising faithful observance of the charters, receives an extraordinary aid from the clergy; three weeks later, at Westminster, however, both estates again refuse the aid for the war in Sicily. In 42 Henry III. (10th April, 1258) (parliament at London), the

the royal ruling power, all the struggles at this time directly refer to the subject of appointments to the chief offices in the King's council. In the year 1248, the barons had raised afresh their complaint against the "favourites," particularly on the point that neither a chief justice, nor a chancellor, nor a treasurer, had been appointed "in parliament." In order to appease them another confirmation (1253) of the charter took place at a convocation of the prelates in the great hall at Westminster, accompanied by the greatest ecclesiastical ceremony, with anathemas and threats of excommunication against every transgressor. Henry swears to maintain the charter "so surely as he is a man, a christian, a knight, an anointed and crowned King." Amidst much confusion and rumour of war, these struggles reach their climax at the council of Oxford (1258), afterwards called the "Mad Parliament," at which the discontented magnates resolve to appoint a sort of protectorate government. The difficulty lay principally in the factions among the magnates themselves; and in the participation which the lesser Crown vassals (the *bachellaria Angliæ*) now claimed in these measures. Therefore a kind of electoral system had to be invented in order to concede a share to these parties as well as to the lesser *tenentes in capite*. Thus an artificial and complicated system of electoral proceedings was arrived at, which was apparently borrowed from that in use for compacts, arbitrations, and ecclesiastical meetings, where there were two definite and opponent parties (Stubbs, ii. 77). Twelve of the royal council and twelve barons were to meet together and appoint a permanent council of fifteen, which actually for some time took upon itself all the powers of the royal government. The constitutional ideas of this period are the expression of the views of the barons as a class on the subject of their participation in the political government; a parliament three times a year; annual appointment of the

barons hold out the prospect of a *commune auxilium*, if the King will consent to reform the administration of the realm. The King promises on oath that this shall be done by twelve *fideles* of his council, and twelve other *fideles*, who shall be chosen by the *proceres* themselves.

chief justice, chancellor, and treasurer in parliament; the barons to undertake to guard the royal castles; the sheriffs in future to be chosen by the counties. On the other hand, the barons shall be no longer bound to appear as suitors before the sheriff. (3[a])

The regency based upon these ideas procures obedience to be sworn to itself, then expels the King's nearest relations, and prolongs the tenure of offices in its own interest. On this point fresh dissensions arise among the nobility. An attempt at mediation by King Louis of France results in an advantage to the King, who for a short time once more gains the upper hand. But the confederation of the nobles under Simon de Montfort now has recourse to arms, and the King is taken captive in the battle of Lewes (12th May, 1264); Magna Charta is again confirmed, a new regency appointed in the name of the King, and an assembly of twenty-three barons of the party of nobles convoked as a "*parliamentum*."

(3[a]) On the 11th June, 1258, the prelates, earls, and "nearly a hundred barons" appeared at this meeting at Oxford, which in a royal "letter of safe conduct" of the 2nd June is called a *Parliamentum*. Each party choose for themselves twelve for a committee of twenty-four, these twenty-four then choose four from their number, and the four thus elected form the royal council of fifteen persons. The committee thus elected of twenty-four, demands first of all the faithful observance of the charters which have been so often sworn to. The appointment of the chief justice, chancellor, treasurer, and other officers to be elected annually shall for ever reside in the committee. Three times a year a parliament is to be held: on the 6th of October, 3rd of February, and 1st of June. In these judicial assemblies, the chosen counsellors of the king shall appear (whether they be summoned or no), to deal with the common business of the realm, in so far as the King commands it. For this purpose twelve persons were appointed (two bishops, one earl, nine barons), to represent the *communitas* in such further deliberations, and especially in undertaking the burdens of the *communitas*. The "twelve *probes hommes*, with the King's council in the three parliaments, shall deal with all the public affairs of the nation; and the *communitas* shall accept as settled what the twelve do." Other ordinances also were resolved upon. The assembly chose a special committee of twenty-four (three bishops, eight earls, thirteen barons), to deliberate upon an *auxilium*, on which matter, however, no final decision was arrived at. A decree further ordained that in each county "*quatuor discreti et legales milites*" are to be chosen to deliberate on the national grievances and report thereon at the next parliament. These are the main characteristic resolutions of the Mad Parliament at Oxford, which the Peers' Report, i. 101–127, treats of in detail. In consequence of the application of the elective principle, the central government now fell into the hands of an elected national ministry, consisting of fifteen persons, the majority of whom were hostile to the King, and thus begins a systematic party government.

But the victorious party meets from the first with but doubtful obedience. The county officers appointed by it manifest an arrogant and arbitrary behaviour. During the reaction, and the disunion of the leaders which soon again ensued, Prince Edward succeeded (28th May, 1265) in escaping from the captivity in which he had been kept by the barons, and with a hastily collected army of followers surprised the insurgents. After the battle of Evesham, in which Simon de Montfort himself was slain, the party of the barons appear in the course of a few months to have been entirely scattered. (3[b])

(3[b]) The resolutions of Oxford proved in the event that it was impossible to apply a principle of election to the informal and inharmonious vassals of the Crown in England. "Almost a hundred barons" had appeared at Oxford; but even this comparatively small number of lesser Crown vassals was sufficient to pass extravagant resolutions. Those members elected by the lesser vassals appeared only as representatives of the claims of the feudal nobility. In the elections the Church was most grudgingly dealt with. But most of the lesser knights also were yet ill satisfied with the committee of estates of twelve, which was to represent them once and for all. Even in the next parliament (6th October, 1258), the "*Communitas bachellariæ Angliæ*" sends in a sort of loyal address and a complaint directed to Prince Edward. The disunion among the barons increased. In 45 Henry III. (parliament at Winchester, 1261), the King lays before them a papal bull, by which he has been released from his oath to observe the provisions of Oxford, and which in like manner absolves the prelates and laity from their oaths in respect of all decrees prejudicial to the King. The Bishop of Worcester and Simon de Montfort, on the other hand, summon for the 21st September, 1261, an assembly at St. Albans, to which three knights are summoned from each county. The King summons for the same day a council at Windsor, and commands the sheriffs to send the said knights to the King, and to no one else, "*supra promissis colloquium habituri.*" The subsequent parliaments in vain negotiate with the view to a compromise. In 48 Henry III. (parliament 13th December, 1263), the dispute between the King and the barons is referred to the judgment of the King of France, as arbitrator. This judgment is published, and declares the provisions of Oxford null and void. In 48 Henry III. (parliament at Oxford, 30th March, 1264), the barons adhere to the assertion that the provisions so solemnly sworn to, were based upon Magna Charta, and declare to abide by them until the end of their lives (Hody, 359). Immediately afterwards the barons' war breaks out; the King is vanquished and taken prisoner in the battle of Lewes, on the 12th May, 1264. On the 25th of May peace is proclaimed; in twenty-nine counties conservators of the peace were appointed, and writs (dated 4th June, 1264) are issued summoning a parliament, to which also "*quatuor de legalioribus et discretioribus Militibus Comitatus, nobiscum tractaturi de negotiis predictis,*" were summoned. At this parliament, held at London, decrees were issued by the prelates, barons, and the *communitas terræ* there present, *pro pace regni.* But now a rupture takes place between Montfort and the Earl of Gloucester. In 49 Henry III. (20th January, 1265), a parliament is held in London, to which were summoned the Archbishop of York, twelve bishops, sixty-five abbots, thirty-six priors, and the Master of the order of the Templars, and also five earls, and seventeen barons, the last named probably all belonging to the party of Simon de Montfort (Peers'

The fourth and concluding epoch of this reign takes externally a quiet course with the conclusion of peace, an amnesty, and the arbitrators' awards (dictum of Kenilworth). The King once more takes back the power of appointing to offices. Such of the rules laid down in the provisions of Oxford as are not at variance with the royal prerogative, are confirmed by the King with the consent of parliament; and after severe trials we find Henry again in the parliament at Marlebridge, regulating the affairs of the nation as law giver, though he has given up his foreign favourites, and has repeatedly confirmed Magna Charta. (4)

The parliamentary progress in this chain of events touches two points:

Reports, i. 141–145). But there is besides, a clause to the effect that the *Vicecomites* are to send two knights from every county, the cities and burghs two citizens, and the cinque ports each four men to the assembly (see note at end of the chapter).

(4) The important precedents in the fourth period are: In 49 Henry III. (parliament at Winchester, 8th September, 1265), the bishops were summoned with the exception of the four bishops belonging to Montfort's party. Also a number of secular Crown vassals, including the widows of the earls, barons, and knights, who had been slain or taken prisoners in battle. The landed estates of the rebels were confiscated and distributed amongst the "friends of the King." The frivolous and faithless conduct of the King, however, caused the Earl of Oxford again to appeal to arms, and to play the part enacted in later times by Duke Maurice of Saxony. In 50 Henry III. (24th August, 1266, parliament at Kenilworth), a commission of three bishops and three barons was appointed by the King *et a baronibus consiliaribus Angliæ*, to provide for the welfare of the country, and for those who had been disinherited. Those six are, in like manner, to choose six others. The papal legate and Prince Henry are to decide as umpires. The so-called *dictum* (award), of Kenilworth was agreed on. At the parliament held at Northampton on the 26th of October, the verdict of the twelve was published and confirmed. The partisans of Montfort were restored to their possessions on payment of five years' income, or less, from their estates, according to the gravity of their offence. On the 18th of November, 1367, a parliament or *commune concilium regni* was held at Marlborough, "*ad meliorationem regni et expeditionem justitiæ.*" There were present, besides the *magnates et discreti*, also the chief justice, the chancellor, the judges, and others of the King's council. The resolutions, under the name of the "*Statuta* of Marleberge," must always be considered as a portion of the national legislation (Peers' Reports, i. 159). In 53 Henry III. (parliament at Westminster), the *potentiores* of the cities and burghs, as well as the magnates, were invited to the solemn translation of the bones of Eadward the Confessor to Westminster Abbey. After the close of the ceremony the *nobiles* form a parliament and grant a twentieth with the consent of the *regni majores* (Peers' Report, i. 161). In 55 Henry III., on the 13th of January, 1271, at a parliament of the magnates held in London, the lords and others who had been disinherited were completely restored to their possessions *per communem assensum*. In the following year Henry III. died.

(i.) The right of the Crown vassals to assent to the imposition of *scutagia* and extraordinary aids, is established by more than twenty precedents, and indeed as much by grant as by refusal.

(ii.) In connection with the tax-voting assemblies, the participation of the magnates in the promulgation of royal ordinances also revives. A number of the legislative resolutions of this period were, in the later judicial practice, put on the same footing with the subsequent parliamentary statutes, and were enrolled among the collections of laws; notably, the *Provisiones de Merton* (Rotuli, cl. 20 Henry III.), and the so-called *statutum de Marleberge* (Rotuli, cl. 44 Henry III.), etc. This last is at the outset described as "*provisiones, ordinationes et statuta subscripta*," and is similar in form and contents to the statutes published under Edward I.***

Among the varying fortunes of these struggles, the advance of the Crown vassals towards a constitutional position is unmistakably evident. After numerous confirmations so much had been achieved, that even at the climax of each successive reaction there is no longer any question of a repeal or curtailment of Magna Charta. The omission of articles 12 and 14, which dealt with the grant of *scutagia* and *auxilia*, was compensated for by an effectual practice of grant and refusal. All circumstances appear to concur favourably to originate a constitution of the estates of the realm. A weak and faithless monarch endeavours to get rid of the disagreeable guarantees of Magna Charta; he is forced on five different occasions solemnly to recognize their validity. He endeavours in the old way, with the help of favourites and official clerks, to restore personal rule; the power of the prelates and barons

*** It is from the precedents given in notes 1–4 that the above results, viz. the right of the barons to assent to the extraordinary aids, and their participation in the most important decrees of the King, are deduced. From the so-called Statute of Merton onwards, a number of these ordinances were adopted into the later collections of laws, most completely into the "Statutes of the Realm" (1810), edited by the Record Commission. The most notable are the *Provisiones de Merton* (statutes, p. 1), the *Statutum Hiberniæ* (p. 17), the provisions touching leap year (p. 7), the *Dictum de Kenilworth* (p. 12), the *Statutum de Marleberge* (p. 19).

drives him to dismiss these counsellors, to banish them, and to accept the great officers who are directly forced upon him. His chronic state of pecuniary embarrassment compels him constantly to assemble parliaments; but almost every demand is met by statements of national grievances, which the Government sees itself compelled to redress. Prelates and barons vie with each other in an opposition, which is based upon the memories of the Great Charter, upon common interests, upon an increasing respect for class interests and associations, and upon the weakness and perverseness of the King. The discontented barons at length find a leader in Simon de Montfort, the brother-in-law of the King, a magnate renowned alike as a statesman and a general. Under such leadership the nobles succeed for the first time in vanquishing the monarchy in open battle, and in taking captive the King and the heir to the throne.

And yet the great successes of the barons are neutralized with marvellous rapidity; no parliamentary constitution results from their victory, in the sense of the feudal constitutions of the Continent; because as a fact the material conditions of a parliamentary constitution were still wanting, alike in the form of the governmental power, and in the formation of the estates.

In the first place, the royal rule had still the character of absolutism. All sovereign rights still appeared as emanations from a personal will. The possessions and rights of the dominant class, the position of the vassals of the towns, every form, normal or exceptional, of the liberties and franchises, was still based upon the personal decrees of the king. The limits of this power had indeed been indicated in general outlines by Magna Charta; but the executive laws were still wanting which were to introduce these principles into the practice of the Exchequer, and of the royal county and local magistracies. Against the decided personal will of the king, neither the committee of the King's court, nor the bureaucratical Exchequer afforded a reliable protection. How should the discontented magnates in such a constitution establish a

check upon the squandering of the national resources, the abuse of the discretionary military, financial and judicial powers, unless they themselves exercised these powers? All political administration was so framed as to receive its impulse directly from the King and his personal advisers. This bureaucratic form turned all the influence exercised by the magnates in the direction of appointments to the great offices and the shrievalty. They were thus in the most direct way placed in possession of the power; but the influence and the sagacity even of the most clear-headed leader could not hinder the immediate abuse of this power; an abuse which was at once itself felt by the opposite party, as well as by the lower classes, and incited them to resistance. Every exercise of the rights of sovereignty was regarded by jealous partisans as despotic; and every refusal of a favour was interpreted by adherents as an insult and a reason for revolting. Without any fault, so far as is proved, of the great leader, the unlimited power was converted into a party instrument in the hands of the victorious, but politically speaking inexperienced party. The dissatisfaction and reaction that ensued, restored the so-called "King's friends," *i.e.* foreign adventurers, covetous dependents, and officious clerks to their former positions. As the monarchy is in no direction equal to the situation, there arises that wavering and apparently aimless struggle which we have seen.

But regarded from below also, the Crown vassallage still lacked the form for an adequate representation as a collective whole. Their feudal position excluded the sub-vassals, as it did all the other freeholders, from equality with the Crown vassals. In this period the Crown vassals still comported themselves as the *communitas terræ*, as a matter of course and in good faith, knowing that they had the nation at their back. In another direction, however, the *esprit de corps*, and the self-esteem of military honour confirmed the lesser King's vassals in the idea of their being *pares;* whilst the princely lords, who were related to the royal house, and also the prelates, refused to recognize such an equality, which in point of

numbers would have placed them in a modest minority. An election of representatives of the inferior nobility to attend a *concilium regis* could no more be successful in those times than at the present. If real political performances were to be represented, the thousands of sub-vassals, the freeholders and the towns were of greater importance than the lesser barons. The attempt to allow only a hundred "barons" at the Parliament of Oxford to participate at the election of a national committee, resulted in an immoderate assertion of feudal claims. The personal rule is followed by a personal opposition rule with confiscations, banishments, and bloody struggles, in which on both sides the followers are sacrificed, whilst the great lords introduce among one another private warfare, letters of challenge and all the ceremonial of chivalry; a state of things which, under an impotent and perverse Government, appears worse than the previous national grievances.

There was still something incomplete in these constitutional conditions which neither the spiritual nor temporal barons were able of their own energy to surmount. It consisted in the onesidedness of each social class interest, so that each party of the barons after gaining the victory, knew of no other use for the absolute political power, than to advance and enrich themselves and their party. In like manner from those party struggles no form was discoverable for giving the lesser barons a constitutional position by the side of the greater, and for securing to the freeholders of the land the portion belonging to them, side by side with both. Only the negative experience had as yet been made that it was unadvisable to form the inferior nobility into a body of electors. The politic leader of the party of the nobles had, it is true, found a form for the representation of the larger *communitas*, but it was once more lost in the party conflict. It was reserved to the able successor of Henry III. to develop the third element which was still wanting in the representation of the State.

That third factor is the *collective body of the sub-vassals and*

the freemen of England. The *communitas* of the counties and cities had been hitherto excluded by the feudal system from immediate participation in national affairs. This defect had been involuntarily acknowledged on all sides. From the commencement of the reign of Henry III. the attentions paid to them are increased. They are requested to bring forward, by deputies, their complaints against the sheriffs; they are employed in reforming and raising the taxes; they are offered the election of their own sheriffs; and in 1258 they are invited to choose two knights "*vice omnium et singulorum,*" in order that these shall appear to deliberate upon the *auxilia,* "*coram consilio regis.*" In 1261 Simon de Montfort summoned three knights from each county to a deliberation upon the "State business," whilst the King invited the same deputies to his council at Windsor. But after Henry had been taken prisoner, Simon de Montfort summoned, in the King's name, two knights from each county, and two citizens from a number of townships to a national council on the 28th of January, 1265; and so in a certain sense this epoch may be said to close with the birth of the Lower House.

NOTE TO CHAPTER XIX.—The germs of a representation of the shires and cities by chosen members appear at the close of this period as first attempts. In the older political controversial writings erroneous stress was laid upon events which contain nothing about the participation of shires and cities in the voting of taxes and in legislation. The oldest precedent is said to have occurred in 15 John, in a military summons, containing the following clause: "that *quatuor discreti milites* from each shire shall be chosen in the first county court *ad loquendum nobiscum de negotiis regni nostri.*" Here only confidential men are meant, with whom the King wishes to deliberate at the time when the invasion from France was threatening; the question is here neither one of laws nor of the granting of aids, nor does it appear whether the assembly was actually held or not. In 10 Henry III. (1226) writs were addressed to the sheriffs of Gloucester and of seven other counties, with the command to have *quatuor milites de legalioribus et discretioribus* chosen by the *milites* and *probi homines* of the shire. But the *quatuor milites* are only to appear as indictors of the *Vicecomites* concerning a violation of Magna Charta. In 58 Henry III. (council at Westminster) the sheriffs were ordered each to send two *legales et discretos milites* to the council, "*vice omnium et singulorum eorundem ad providendum, quale auxilium nobis in tanta necessitate impendere voluerunt.*" In like manner, writs are addressed to the bishops with directions to assemble the "*archidiaconos, viros religiosos, et clerum*" in their dioceses to deliberate upon a subsidy. The lower clergy are then to send their proxies and report their resolutions. The Peers' Report (i. 56) acknowledges this to be the first documentary evi-

dence of an attempt to send representatives of corporations to a council. But the question is here only one of a participation of the lesser vassals of the Crown in a deliberation touching extraordinary aids. Now for the first time the attempt was made to grant them a definite share in the proceedings side by side with the greater barons, in the person of two representatives chosen from their midst, instead of the general collective summons by the sheriff, projected by the charter. In like manner the two knights mentioned in the writ, were not summoned direct to parliament, but only to appear "*coram concilio nostro*" (Parry, Parliaments, xiii.). This event is of importance as being the first form of a representation, though only of the Crown vassals, and only for money grants. In 42 Henry III., at the Mad Parliament at Oxford, this elective principle adopts a new form, about a hundred barons being convened to the parliament itself, that is, for the most part *lesser* barons, and a committee of twelve chosen from those there assembled; an application of the principles of suffrage, which at last leads to a civil war. But here also it is only the Crown vassals that are meant. In the summer of 1261 (45 Henry III.), the Bishop of Worcester and Earl Simon convoked an assembly at St. Alban's for the 21st September, 1261, with the order that three knights of each county should appear, to deliberate in common upon national affairs. The King, on the other hand, fixed the same day for a council at Windsor, and commanded the sheriffs to send the said knights to the King "*supra promissis colloquium habituri.*" This was certainly an attempt to convene representatives of the shires for a legislative assembly (Peers' Report, i. 133); but it was made in a tumultuous and discordant manner, and its result was so unsuccessful, that it could not rank as a precedent. In 48 Henry III., at the Parliament held in London on the 24th of June, 1264, whilst the King was the prisoner of the barons, by orders issued to the conservators of the peace four knights were summoned from each of twenty-nine shires in the following formula: "*Vobis mandamus quatuor de legalioribus et discretioribus militibus dicti comitatus, per assensum ejusdem comitatus ad hoc electos, ad nos pro toto comitatu illo mittatis. Ita quod sint ad nos Londini, in octavis, etc., nobiscum tractaturi de negotiis (nostris et regni nostri) prædictis.*" But the question here touches only the restoration of the national peace, and a deliberation concerning it, with four trusted men. As the "*fideles nostri,*" are mentioned, it is evident that only Crown vassals can be intended. It is likewise proved that the grant of a twentieth in this year was only made by the *prælati et magnates.* (Parry, Parliaments, xiii.). It was not until 49 Henry III., at a Parliament held in London, on the 20th of January, 1265, that the first precedent of the summons of deputies of the shires and cities occurs. The King, who was still a prisoner of the barons, issued personal writs to one hundred and twenty-two clergy and twenty-three temporal barons, "*ad tractandum nobiscum et cum concilio nostro, necnon et aliis arduis regni nostri negotiis.*" And then further, "*Item mandatum est singulis Vicecomitibus per Angliam, quod venire faciant duos milites de legalioribus et discretioribus militibus singulorum comitatuum, ad Regem Londini, in octabis prædictis in forma supradicta. Item in forma prædicta scribitur civibus Lincoln, et cæteris Burgis Angliæ, quod mittant in forma prædicta duos ex discretioribus tam civibus quam burgensibus suis. Item mandatum est baronibus de probis hominibus quinque portuum, quod mittant quatuor de legalioribus et discretioribus,*" etc. The text of the writs addressed to the sheriffs and towns has indeed not been preserved to us, but probably nearly agrees with those addressed to the Cinque ports. "*Ita quod sint ibi in octavis prædictis nobiscum et cum prælatis et magnatibus regni tractaturi et super præmissis auxilium impensuri,*" etc. With this act a form of summoning the *communitates regni* originates with the following innovations:—

(i.) Not only were representatives of the lesser Crown vassals convened, but the shires and a number of towns as such, were represented by two members of the body of the community of the shire and the citizens.

(ii.) These representatives were directly convened to deal with the business of the nation; no longer as formerly, merely for the military levies, or for peace negotiations, or for particular judicial and administrative purposes.

This is therefore the act which originated the later Lower House. The majority of the older historians of the Constitution have rightly recognized this; as, for instance, Spelman, in his "Glossarium," under the word "*Parliamentum*," and again in his special treatise on Parliaments. The same result is deducible from the reprint of the Parliamentary writs by Prynne (1659–1664), and from Dugdale's "Summons," but principally from the Peers' Reports on the dignity of a Peer, vols. i. and v. Among more recent treatises, this has also been acknowledged as a safe deduction by Hallam ("Middle Ages"), and Parry ("Parliaments," xii.). The summons of 1265, however, does not as yet show how far the convocation of the shires and cities was constitutionally necessary for the publication of decrees and the deliberation upon subsidies. The circumstances attending the convention were of such an extraordinary kind, that the necessity of a repetition did not as yet result from them. It was with such councils almost as with Henry the Second's assembly of notables; they cease again, simply owing to the fact that the King no longer summons such extraordinary assemblies. After the overthrow of Simon de Montfort and his party, all that we hear of is the restoration of the ancient constitution and national rights. The further *concilia* held by Henry III. are summoned in the ordinary way by personal writs addressed to a number of prelates and magnates; only from these councils the later money-grants proceed; only from them the statutes of Marlebridge. The event of 1265 was of moment in the same way as the Assizes of Clarendon and Northampton a hundred years before; the lesser vassals and the freeholders had for the first time been combined into a body, and had the consciousness that to them belonged under certain circumstances a share in the King's council.

CHAPTER XX.

The Class-relations of the Anglo-Norman Period.

At the close of this period we must summarize from all the conditions, which we have hitherto traced in detail, the influence of the feudal system upon the formation of the Anglo-Norman estates. After the close of the first century from the Norman Conquest, the law work of Glanvill displays to us the English feudal law complete in its technical development. The "Liber Niger" (edit. Hearne) gives a sketch of the greater feudal estates in the same period, while the collection of Testa de Nevill (edit. 1807) furnishes one for the close of the period.

At the beginning of the period the Norman Crown vassals evidently regarded themselves as a ruling class; the subvassals were looked upon almost as a middle class, the rest of the population as vulgar *rôturiers*, as nearly as possible like the class liable to the "*taille*" in France. The feudal system, by blending office and property, and by turning all relations of dependence into those of service, had everywhere the tendency to create an hereditary ruling-class and an hereditary serving-class. In England it was the power of the monarchy which checked this process of development. The royal power was here strong enough to keep the spiritual and the temporal power, the military and civil departments, and the personal right of honour, as well as the hereditary right of property, within their fixed and proper limits, to make every higher right *in* the State, dependent upon higher performances *for*

the State, and not to allow the nobility and knighthood to become an aristocracy of birth, but to keep them upon the level of a "class-right." The imperfect development of estate privileges is decidedly the strong side of these institutions; and one which rendered the formation of a vigorous parliamentary constitution possible in the next period. Through the power of the monarchy, in England, the combination of property with State duties and with political rights was guided into grooves different from those on the Continent, and formed the following degrees:—

I. **The Class of the Greater Vassals,** which is subject to the greatest change, embraced in its original distribution after the Conquest those men, who had already on the Continent enjoyed the rank of count, or who had brought whole divisions to the army. The estates of the twenty greatest feodaries in Domesday Book contain, according to the ordinary computation; 793, 439, 442, 298, 280, 222, 171, 164, 132, 130, 123, 119, 118, 107, 81, 47, 46, and 33 knights' fees with various appurtenances. In an analogous position with regard to property were the bishops and many abbots. If the comparative smallness of the knights' fees be borne in mind, and the constant diminution of the lordships by subinfeudation, it will be seen that they were originally much smaller than the duchies and earldoms of the Continent. Of still greater importance was their want of compactness, which dated from the Anglo-Saxon period, the possessions of the four greatest feudatories being scattered throughout from six to twenty-one counties. Between these lay the royal demesnes and the estates of lesser vassals in all the counties. The landowners accordingly could not consolidate themselves, for the strict law of escheat on failure of an heir to the fee, or confiscations, would often bring back the same estate to the Crown several times in a single century. The great feudatories of the time of the Conquest are all found during the first century among the rebellious vassals. The three greatest grants were recalled by the Conqueror himself. As a rule, however, the older lordships remained intact, and were

referred to in the Exchequer as extraordinary fees under the name of "capital honours." Their sub-vassals who were scattered throughout the counties were summoned by the royal *Vicecomes*. The formation of a compact military power was thus actually and legally hindered by the prohibition of private fortresses, and by the oath of allegiance paid by the sub-vassals to the King. The same impediments checked the power of forming great feudal courts, which became in later times more and more confined, owing to the system of itinerant justices and the permanent central tribunals, and was further diminished at each successive re-grant. The Norman Period was certainly not deficient in external splendour. Many a manorial household formed a small court with the ancient court offices, which were sometimes even hereditary. Many lords are described as being owners of parks; certain of them, with royal permission, possessed a fortified castle. In the charters addressed to their men and tenants, they made use of the style of the royal charters: "*Dapifero meo et omnibus hominibus meis, tam Francis quam Anglis.*" But with all this splendour there was no solid foundation, and most especially the support found in faithful vassals was lacking. After all, the eminent position of these lords was more an actual than a legal one. The *barones majores*, indeed, appeared in the military array as bannerets; their reliefs, wardships, and marriages form the principal items in the Exchequer (Dialogus de Scacc., ii. c. 10), and in the rating of the *relevia* and amerciaments, they had the undesired honour of a higher scale. As a matter of course at the royal assizes, the *barones majores*, being summoned to court by name, were put before the squireless knights. But if in spite of these things, no hereditary dynastic families arise in England, and the position of the great vassals remains based merely upon class-rights and privileges, as in the Anglo-Saxon period, when the great Thane, as such, has no greater *Weregelt* than the county Thane, it is due to the conjunction of the following circumstances:—

(i.) Firstly, to the difference in origin, because in England

the lord's position was not founded upon Seigneuralty (that is, the transference of military service from the small to the great landed estates), but upon the police protection of the *Hlâford*. Besides this the monarchy did not allow any extension of the manorial, judicial, and police powers to arise, and no privileged right to a court of peers, and no exception to military service; but by the assize of arms it rather raised to a living military institution that popular array which in the northern counties had always remained able to take the field. The haughty bearing of the martial classes against free civilians found therein an effectual barrier.

(ii.) It was also due to a difference in its development. After the reign of Henry I. the great bishop, Roger of Salisbury, whose family for a hundred years occupies so eminent a position in the administration of the realm, is to be regarded in some measure as the founder of a new official nobility, the distinguished members of which not only find their way into the bishops' sees, but also, by grant of manors and by marriage, into the great nobility, such as the Bassets, Clintons, Trussebuts, etc. At the close of every two generations of this period the larger portion of the greater baronies appear to have passed into the possession of other families. As early as the commencement of the twelfth century the great nobles of the conquering army were, in consequence of their unsuccessful rebellion against the monarchy, dispossessed of their original estates. Under Henry II. the newer official nobility already forms the majority of the body of great barons, whose descendants take the lead among the barons of Magna Charta. Other families again appear in the foreground of the barons' war. The English prelates also are not local rulers, after the manner of the French and German electors and bishops, but an official nobility, which conducts the great business of the nation in common with the secular official nobility, and on that account with all the more uniformity.

(iii.) The striving after an hereditary position for the ruling class accordingly, in England, takes a direction not towards the foundation of independent local lordships, but towards a

participation in the supreme council of the Crown. This personal vocation must, according to the nature of the case, be confined to the firstborn alone. In the same manner the heavy burdening with military service and taxation leads to a limitation of the privilege to the firstborn, and thus lays the foundation of the hereditary peerage, which arises in the following epochs. (1)

II. **The Second Class** was formed by the lesser Crown vassals, gradually blending with the sub-vassals. (2)

(1) On the formation of the class of the higher nobility, and subsequently of the knighthood, I may be permitted to refer my readers to my treatise, "Adel und Ritterschaft in England" (Berlin, 1853, 8vo.), upon which, however, the authorities of Hallam and Allen, and the older ones of Selden and Dugdale, have here and there had too great an influence. As to the first distribution of landed property by the Conqueror, cf. above, pp. 124–128 (Ellis, "Introduction," i. 226 *seq.*). The manner in which the estates of the magnates were mingled together, is shown by the following survey of the number of hides (*hidæ*) in Sussex, in which county the manorial possessions are especially numerously represented: Earl Roger, 818 manors; William of Warenne, 620; Earl Moreton, 520; William of Braiose, 452; the Archbishop of Canterbury, 214; Earl Oro, 196; the Bishop of Chichester, 184; Bishop Osbern, 149; the Abbot of Fecamp, 135; Battle Church, 60; the King, 59; the Abbot of St. Peter, 39; the Abbot of St. Edward, 21; Odo and Eldred, 10; the Abbot of Westminster, 7. As to the supposed estates of earls, *barones majores*, and *minores* of this period, cf. above, p. 288.

(2) The formation of the English knighthood is in its final result described in the *Testa de Neville sive Liber Feodorum in curia Scaccarii tempore Henry III. and Edward I.* (1 vol., folio, 1807), (Record Commission). The enumeration of all the small Crown-fiefs, the tenures by frankalmoign, and the amount of the *scutagia* and *auxilia* paid by each Crown vassal prove to us, that upon the foundation of possessions like these, no separate class could be built up; indeed, the lesser Crown vassals were sure to lose themselves in the mass of the sub-vassals, who frequently possessed two, three, four, and more knights' fees, and in whom the old Saxon Thanehood was also represented. How doubtful in many points the line of demarcation was, is shown by the county of York, where, of one hundred and five Crown vassals, only twenty-nine are large land-owners; the rest were as a rule described as Thanes of the King, whilst they are only in possession of desolated lands, which at the time of Domesday Book could not possibly perform a knights' service. The word "*miles*" sometimes designates a simple horseman, and sometimes an important possessor of great knights' fees. Even this use of the term expresses that the tenures of property and the performances in the commonwealth are each considered separately, and that accordingly no separate class-relations are in existence, arising from the blending of personal rights and duties with possession. The *homagium*, too, does not express such rights. It is an established fact, that an oath of allegiance can be taken to a private individual for a fief and the grant of an estate in return for service; without them, certainly only to the King (Bracton, ii. c. 35, sec. 6). It is, moreover, useless to try to import from the Continent into England, a technical distinction between *homagium ligium* and *simplum*. The *ligium* means the feudal oath generally (Glanvill, ix. c. 1; Bracton, ii. c. 35, 37; Fleta, iii. c. 16, sec. 16; Britton, c. 68). The honour of serving the King belongs in the first place to the greater land-owners, and is therefore considered

The lesser Crown vassals differ in no way from the greater in respect of their tenure. They are directly enfeoffed of the King, and are competent to sit in judgment upon every Crown vassal, as *pares* of the *Curia Regis*, so soon as they are summoned to it. Many of them find, in influential offices, a position which is outwardly also equal to that enjoyed by the great vassals. Of the original number of about four hundred *barones minores*, the majority were probably from the first owners of knights' fees in Normandy, or younger brothers and sons of such possessors; and the rest the holders of small court-offices, as the under-chamberlain Herbert, the four cooks, the carpenter, the bow-stringer, the forester, the falconer, the steward, the porter. Only in a few cases do the names, like Oswald, Ealred, Grimbald, Eadgar, Eadmund, and Ællured, indicate Saxons.

Of the great number of the *sub-tenentes* (7871) in Domesday Book apparently less than half are really subinfeudated sub-vassals; they are for the most part Saxon Thanes, and free followers doing service, among whom formal subinfeudation made only slow progress (above, p. 126). So far as such investiture took place, the possessions of the ecclesiastical mesne tenures seem to be on the average somewhat greater than those of the secular tenants. The sub-vassals, who had themselves received more than a knight's fee, might also themselves have *sub-tenentes* under them. The majority of the Norman sub-vassals were probably at the Conquest the dependents of the greater feodaries, younger brothers or sons, servants, soldiers, or other people who had been till then landless. About half of them, as far as can be judged from the names, were Saxon Thanes who kept their old possessions —and who had become, very much against their will, subject to Norman lords.

In respect of the amount of their landed property, the two classes appear from the first equal. Their feudal possessions were comprised in the soil with its customary rights. Upon

all the greater honour for the lesser landowners. To be a "liege subject of His Majesty" is still regarded by the Englishman of the present day as an honour

the estate, endowed with manorial rights, the landowner raises through his bailiffs (*præpositi, reeves, stewards*) the customary dues; and being generally represented by them, holds his court in the forms of the court baron and customary court, and by virtue of later grant a royal local magisterial court or court-leet. But the possession of a manor is independent of a military enfeoffment, and we even meet with manors in the possession of *socmanni*. In like manner the position of a lawman (*liber et legalis homo*) is independent of a knight's fee.

The uniform pressure which the royal power exercised upon the greatest as upon the least of the vassals, was sure in this state of things to make all the lesser vassals appear more and more as one homogeneous body. Since subinfeudation was the only form of independent disposition of fiefs, in numerous cases Crown vassals became, in respect of newly acquired property, under-vassals; even the great feudatories and prelates did not disdain to hold a fief by under-tenure of other lords and of the Church. The methods of holding property became thus so complicated, especially after the Crusades, that all idea of a lower rank as attaching to subinfeudation disappeared.

The development of the chivalrous fraternities had made the dignity of knighthood a common bond of union for all vassals. Education, profession, martial honour, and participation in the county assemblies, are the same for the whole host of the lesser vassals. Every honorary precedence of the lesser Crown vassals over the sub-vassals became more and more problematical when in re-grants of manors the Crown changed the mesne vassals into immediate vassals, and with the sanction of the King new holders entered upon the small Crown fees.

And when at last the statute of *Quia Emptores* (18 Edw. I.) entirely prohibited new subinfeudations, in order to put an end to the interminable complications in the tenure, when every new possessor became from thenceforth the immediate vassal of the lord paramount, it would have been absurd to concede to the lesser Crown vassals, as such, the right of

taking precedence of the old sub-vassals, who had been established for generations upon their old landed estates. From the time of Henry II., moreover, the decisive innovation had arisen of a money payment being more and more regularly substituted for personal military service; there was also no further difference in this respect between the two tenures than that the lesser baron paid his scutage to the sheriff, and the sub-vassal sometimes to his lord's officer, and sometimes to the sheriff.

A comparison with the state of things on the Continent proves to us that the main point of distinction in England was the *alienability* and *divisibility of the knights' fees*, the inalienability of which was the chief basis of the lesser continental nobility. In England it was impossible to maintain the inalienability of the fees, for the very reason that the feudal bond had become extended to the whole of the landed possessions in the country; alienability was even promoted by the fiscal maxims of the Exchequer, to which every solvent holder was equally agreeable, as well as by the ease with which the royal consent could be obtained for all sorts of matters on payment of fees. The period of the Crusades, for instance, was productive of numerous and extensive alienations, mortgages, and partitions. After the acquittance of feudal service by scutages, feoffments and subinfeudations appeared altogether only as an onerous method of alienation, through which the new holder took over with the land, the pecuniary burdens of *relevia*, the payment of the periodical *auxilia*, and the restraints attached to feudal wardship, marriages, etc. The alienation carried with it also the creation of new incidental ground rents, which urgently required that the legislature should bring about a simplification of the law of tenure. Hand in hand with this went the splitting up of their land into parcels by the feudal possessors; which was intimately connected with the frequent change of possession, and with the circumstance that the judicial power failed to firmly consolidate itself with the landed interest. Presently the Crown resolved on a re-grant in parcels in cases of escheats

and forfeitures; then again allowed a partition among several co-heirs; and finally alienations even of portions of a fief on payment of heavy fees, so that even hundredth parts of a knight's fee are met with. Hence as early as the middle of this period the number of the possessors of the smaller fiefs visibly increased. Many of them are younger scions of the families of the Crown vassals and sub-vassals; others again freeholders who had been enfeoffed for their military services, or through an act of favour; others were wealthy persons, especially those in the towns, who at the time of Richard I. acquired by enfeoffment such lands as were generally sold to the highest bidder.

The combination of these circumstances in England in the Middle Ages, did not permit of the knighthood becoming an exclusive hereditary dignity. Not real estate as such, but the mastership acquired in doing warrior's service gave a claim to the honorary title of *dominus*, or "sir," which remains a personal dignity that the Crown vassals were bound to take up. This honorary title is also conferred in the Middle Ages upon the higher clergy and graduates of the universities. The word "knight" is used to denote more specially the military rank with it, but since no especial social rights are connected with it, and the rights of possession and influence in the shire, etc., did not depend upon it, the taking up of the dignity of knighthood was in comparatively early times felt rather as a burden, in consequence of the high fees chargeable, and was from time to time enjoined by royal command. Already in these times the Exchequer rolls contained innumerable entries of fees which were paid for a delay (*pro respectu militiæ*). Those possessors of knights' fees who had not acquired the formal dignity of knight now call themselves esquires (*scutarii*). In their shire, the esquire and knight were sufficiently known by their position in the county court. On the other hand, since the Crusades, the adoption of family arms had become more and more an established custom, which in the military array had been rendered necessary by the wearing of armour.

The main issue, the sum total of services to be rendered

to the State, became finally the same for all; the knighthood at the close of this period forms an entirety—a freed and definite station, in which no contrast between noble and burgess landowners ever arose, and without prejudice to the social claims to superior honour advanced by old possessors and families.

III. The mass of the rest of the freeholders and tenants appeared from the standpoint of the Norman knighthood as "*taillables*," a kind of "appurtenance of the soil." The royal assurances after the Conquest contained indeed in general a guarantee for the protection of all existing rights of property. But the mass of the ceorls (*villani*) were still further pressed down by Norman arrogance, as well as by the form of the local police regulations during this period, so that they were with regard to the landowner, in a precarious position, and without a right of possession protected by law. As against the lowest stratum of the people the monarchy allowed the propertied class full sway, just as it had upon the Continent created a "bondmen" peasantry. Moreover, in the Exchequer there was that "*pensée immuable*," which knew full well that the enormous money payments which fiefs had to render to the Crown, must after all be raised through the peasants, and ultimately fell upon them.

Better possessory rights on the other hand were given in Domesday Book, under the headings of *liberi homines*, *socmanni*, *burgenses*. Many among these were old allodial possessors, who became more uniformly subjected to the burdens of the feudal system, the more the principle was carried out that this kind of possession also could be maintained by "redemption," that the inferior possessor must bear the burdens of the vassals, and the Saxon those of the Norman. The extension of feudal principles to it, is evidently the result of an increasing practice, which originating from the Exchequer and the *Curia Regis*, was at last embodied in the universal maxim that "all landed property in the country" is held of the King, either immediately, or mediately through a mesne lord. The legal details of these relations with

regard to private rights will probably never be completely explained. (3)

But with regard to public law the following circumstances intervene and lead to a gradual amelioration of their position.

1. The revival of the county militia after Henry II.'s *assisa de armis*. Even in the feudal militia the military service of such persons had certainly been customary and indispensable as a reserve. Those thus equipped (*servientes*) however appear there only as servants of their lords; whilst the *assisa de armis* summons them as a national levy of their own duty, *i.e.* of their own right.

2. The constitution of the civil courts had allowed all *liberc tenentes* to continue to act as lawmen in the hundred court, which was now certainly in a state of decay. With the beginnings of the jury system their participation became extended. In commissions appointed to take evidence, whose province became more and more only to establish facts, a participation of credible inhabitants of the neighbourhood was requisite. In addition to the knights, other *libere tenentes* were accordingly regularly appointed, but they were not to be mere *villani* or *rustici*.

(3) The common law relations subsisting between freeholders, tenants, and villeins, can only be perceived in some degree from the law books, and considerable gaps are left in the history of their development after the later Anglo-Saxon era. For the period immediately following the Conquest, the list given above (p. 128), taken from Domesday Book, serves as a source of information. The *liberi homines* (*ad nullam firmam pertinentes*) who now and then occur, are probably old allodial peasants against whom at first no claim could be made, and who were only gradually bent down under the judicial and financial practice of the feudal system. *Liberi homines* appear in considerable numbers only in the counties of Leicester, Lincoln, Norfolk, and Suffolk; *liberi homines commendati* occur principally upon ecclesiastical estates. The "Dialogus" shows the light in which bureaucratical opinion held the villeins: "*decretum est, ut quod a dominis exigentibus meritis intervenientе pactione legitima poterant obtinere, illis inviolabili jure concederetur: caterum autem nomine successionis a temporibus subactæ gentis nihil vindicarant, de cætero studere tenentur devotis obsequiis Dominorum suorum gratiam emercari*," etc. (Dial. de Scacc, i. c. 10). In the law works of Glanvill and Bracton the increasing pressure upon the *villani* appears to have reached such a pitch that former villeins and those who had been free possessors from their birth, are comprised under the common expression *villenagium* (Ellis, i. 81). From that time they form the "villeins regardant" in contrast to the landless "villeins in gross" (the remnant of old serfdom). Here also oppression and denial of justice was undoubtedly the source of peasant-subjection.

3. The criminal jurisdiction and police control of the *turnus Vicecomitis* drew to it the whole of the adult population, to give account of the preservation of the peace and to pass an annual magisterial review, *i.e.* "view of franc-pledge." In spite of much that was burdensome in it, it gave rise to a useful habit of common service for the whole people. In the local police tribunals, which had become so numerously subdivided, and which regulated their proceedings according to the pattern of the *turnus Vicecomitis*, the dearth of free-holders caused the *villani* to be constantly employed in actual service as lawmen.

4. In a still greater degree, and systematically, did this become the custom in the courts leet of the towns, in which a considerable burden of taxation was evenly distributed and thus produced the idea of a civic equality. The various ranks and descriptions of property here become inseparably blended together. The sum total of all those who bore scot and lot, are now described as "*liberi homines*" or "freemen," as men fully bound by duty, and fully entitled to their rights. The towns become the nucleus of a new class-formation, framed on the old relations subsisting between *liberi homines*, *socmanni*, and *villani*.

In the whole picture of these class relations there are found in spite of all the pressure exercised by a fiscal and police *régime*, important germs for future times. However modest the measure of political privileges which these shire and city unions were primarily to gain, the most important foundation of a parliamentary constitution had been already laid; which was, the habitual and personal meeting together for public business, the local and periodical co-operation of the State-bureaucracy with the individual communities.

THIRD PERIOD.

THE PERIOD OF THE GROWTH OF THE ESTATES OF THE REALM.

CHAPTER XXI.

The Century of organizing Statutes — The Union of the Central Government with the Constitution of the Counties.*

EDWARD I., 1272–1307
EDWARD II., 1307–1327
EDWARD III., 1327–1377
RICHARD II., 1377–1399
HENRY IV., 1399–1413
HENRY V., 1413–1422
HENRY VI., 1422–1461
EDWARD IV., 1461–1483
EDWARD V., 1483
RICHARD III., 1483–1485

ALMOST three generations had passed away since the last year of Henry II.'s reign, and the land had not yet found

* Among the sources and works of reference for this period we must place before all others the State records, and particularly the Statute Rolls which exist as the official publication of the Parliamentary legislation of permanent validity from 6 Edward I. to 8 Edward IV., and which are the basis of the official collection of Statutes of the Realm (1810, etc.). As the next source are to be considered the Parliamentary Rolls, that is, registrations made by the officials of the Chancery of the more important proceedings in Parliament, now printed as "*Rotuli Parliamentorum ut et Petitiones et Placita in Parliamento*" (vol. i.–vi. 1832, fol.).

The proceedings of the Continual Council are printed in Sir H. Nicolas, "Proceedings and Ordinances of the Privy Council of England from 10 Richard II. to 33 Henry VIII." (7 vols. 8vo, 1834–1837); see also the Monograph of Sir F. Palgrave, "An Essay upon the Authority of the King's Council" (1 vol. 8vo, 1834). As to the Exchequer, Madox gives information for this period. As to the judicial system, see Foss, "The Judges of England" (1848–64, vols. iii., iv.). The general collection of the State records, Rymer, "Fœdera, Conventiones," etc. extends to 1391.

Of the law books, Britton and Fleta belong to the commencement of this period, as does also Horne's "Myrrour aux Justices," (cf. Biener, "Engl. Geschw. Ger.," ii. 387, *seq.*). The

rest. John's reign had left behind it the indelible impression that even the Great Charter did not as yet afford sufficient protection to person and property against a despotic form of government. Furthermore, it had become evident that nobles and prelates alone were not equal to the new task; Magna Charta had at first only engendered party struggles. Accordingly, during the vicissitudes of Henry III.'s reign both parties involuntarily resorted to the same measure, to give stability and equilibrium to the nascent constitution, by admitting the middle classes in groups distributed according to communities.

By the side of the great feudatories, whose participation in the government of the realm had since the days of Henry III. been immutably established, a middle class had sprung into prominence in the knighthood, owing to the improved position of the sub-vassals and the wealthy freeholders. Their position in the county court, their homes, and their family connections had given the knighthood a solid influence in the towns also, in which likewise a new middle class, but one still inferior to the knighthood, had sprung up from other sources. The monarchy had to make up its mind to give these middle classes a share in the government of the realm, if it did not mean, in its struggles with the magnates, to part with its influence to the committees of the barons, as had been the case under the inglorious reign of Henry III. The experience of the Provisions of Oxford and of the Barons War were of paramount influence upon these times. With Magna Charta and the manifold limitations it imposed upon the administration of the realm, with the great concessions made to the Church, and the growing power of the knighthood and the boroughs, a government such as the kings of

best authority upon the practice of the courts are the so-called Year Books, that is, the collection of cases forming precedent determined in the central courts, from Edward II. Of legal history, Reeves, "Hist. of the English Law," vols. ii. and iii., deals with the period. Of the treatises upon the Constitutional History of England, Hallam, "Middle Ages," cap. viii. and the supplements to it; Lappenberg-Pauli, "Geschichte Englands," vols. iv., v.; but above all, Stubbs, "Constitutional History" (1874, etc. vols. ii. and iii.), whose chief merit and main success lies in this period.

England had formerly carried on by an Exchequer and a number of confidential counsellors, was no longer possible.

The firm establishment of these conditions became the task of the times throughout a series of statutes, beginning with Edward I. the greatest monarch England had seen since Ælfred the Great, and the one whose rule constitutes the most glorious epoch of the Plantagenets. The bitter experiences of his father had taught him that a participation of the estates in the Government could not be refused. Firm and shrewd of character, he resolved to give new strength and stability to the throne by means of those very institutions which had proved ruinous to his predecessor. With the statute of Marlebridge a legislation was begun which now made such progress, that at no other time throughout the Middle Ages was so much law positively established as in the century of the three Edwards. For this legislation no object appeared too great, and none too small. Lord Chief Justice Hale states emphatically that in the first thirteen years of Edward's reign, English law made more progress than in all the centuries from that time until his own day.**

The greatness and the peculiarity of this legislation lies

** Of the fertility of the legislation during this period, the following abbreviated list of the reign of Edward I. may give us a survey: 3 Edw. I., Stat. Westminster 1; 4 Edw. I., Stat. de extenta Manerii; Stat. de officio Coronatoris; 6 Edw. I., Stat. of Gloucester; 7 Edw. I., Stat. dealing with alienations in Mortmain; 10 Edw. I., Stat. of Rutland; 11 Edw. I., Stat. de Mercatoribus; 13 Edw. I., Stat. Westminster 2, Stat. of Winton, Stat. Civitatis Londini, Stat. Circumspectæ Agatis, Confirmatio Chartarum; 14 Edw. I., Stat. Exoniæ; 18 Edw. I., Stat. Quia Emptores (Westminster 3), Stat. de Judaismo, Stat. Quo Warranto, Stat. Modus levandi fines; 20 Edw. I., Stat. of Waste, Stat. de Defensione Juris, Stat. de Moneta; 21 Edw. I., Stat. de iis qui ponendi sunt in Assisis, Stat. de Malefactoribus in Parcis; 25 Edw. I., Stat. Confirmationis Chartarum; 27 Edw. I., Stat. de finibus levatis, de libertatibus, perquirendis, Stat. de Falsa Moneta; 28 Edw. I., Stat. dealing with wardship and reliefs, Stat. dealing with accused persons, Stat. Articuli super Chartas; 29 Edw. I., Stat. amoveas manum; 33 Edw. I., Stat. de Protectionibus, Ordinatio forestæ, Stat. dealing with measurement of land, ord. of Inquests; 34 Edw. I., Stat. de Conjunctione Feoffatis, Stat. on Amortization, ordo Forestæ; 35 Edw. I., Stat. de Asportatis Religiosorum, and so on to a still greater extent under Edw. III. This stupendous stream of legislation may be explained also by the circumstance that the half century of the incapable government of Henry III. had piled up in all directions the demands made upon the legislature. The merits of Edward I. are also fully acknowledged by Blackstone, iv. 425–427.

in the constant realization of a single fundamental idea; the combination of all the functions of the secular executive power with the existing greater unions of communities—a combination by which the people became penetrated with the consciousness of its political duties, inspired with an idea of political unity, and competent to take the preservation of peace and order in their own hands. In this profound system of legislation, as also in Magna Charta, could be perceived the hand of that well schooled bureaucracy which from the close of Henry the Third's reign resumed its normal activity, and continued the internal consolidation of the constitution, under the guidance of a high-minded monarch, and which (in spite of a cessation under Edward II.) finally accomplished under Edward III. the building, in the course of a single century, of the new edifice from the heterogeneous materials at hand.

The necessary cohesion of the counties, hundreds, and boroughs, was already existing, thanks to the retention of the Anglo-Saxon judicial system, to the now perfect reconciliation of national contrasts, and to the opportune transformation of the *judicium parium* into the jury system. The country was indebted to the harsh rule of the Norman period for one great result, viz. the habit of the wealthy classes of being eager and ready to perform the behests of the State in military, judicial, and police functions.

The essential unity and power of the executive also existed, thanks to the strong development of the royal sovereign rights, to the strict management of the Exchequer, to the judicial bench of the *Curia Regis*, and to the elements of a council of State, which had been rising into prominence from the time of Henry III.

The fault lay only in the insufficient combination of the two elements, for which neither the officialist system of Shirgerêfas and local bailiffs, nor the itinerant commissions sufficed; because such institutions in the hands of a despotic government became the passive tools of oppression, and under a rule of grandees were converted into mere unstable and violent party instruments.

This gap had been filled up in the former period by committees of parishes, so far as temporary needs required; that is, when the royal officer, who stood aloof from the people, could not determine questions of fact and local questions, except on the testimony of the neighbours on oath, *i.e.* by means of the provost and four men of the villages, and by the representative body of twelve men or more from the greater unions. In this way the framing of Domesday Book had been brought about; in this way from time to time an establishment of inquests of office (*ad quod damnum*, etc.); the police functions of the court leet; the new method of determining the question at issue in civil actions, and the question of guilt in criminal cases; the ratings for military service, and the first ratings for the hide-impost and income-tax. What was now to be achieved was the permanent and uniform blending together of these elements so as to form an organic union of the central government with the government of provinces, districts, and towns—such an organic union as in our own time forms the problem which the German Empire has to solve. The essentials were—

1. That the rules of administrative law should be as clearly defined as possible, seeing that the fundamental articles of Magna Charta did not as yet suffice for securing a fixed administrative rule, and for the protection of the subjects.

2. The formation of the system of juries into permanent, uniform, and organized institutions of justice, and of military, civil, and financial administration.

3. The development of the higher and lower district offices (justices of the peace, coroners, constables, etc.), for all such dispositions and measures of the executive as could not be performed by the juries, but only adequately by individual officers.

In this manner the organic union of the English Government with the counties, hundreds, and boroughs was brought about; so that the exercise of the undiminished prerogative rights passed by virtue of legal authority to the officers and committees of the provincial unions. Thus arises the world-renowned system of English self-government, the indepen-

dent elements of which had existed already in the former period.***

I. *A blending of the military system with the constitution of the shires*, to form an organized militia (originating in the reign of Henry III.) during this period became necessary, both for the national defence, and on account of the military power of the barons within the realm. The personal liability of the owners of knights' fees to serve, still formed the basis of the ordinary military system; but the feudal roll had already shrunk considerably. The growing opposition of the clergy had greatly restricted the feudal services of the clerical crown vassals. The administrative maxims of the Exchequer had, in the case of re-grants of land, rather aimed at acquiring great revenues than at the permanent interests of national safety; many groups of estates were granted under the names of "baronies," for the purpose of raising the great *relevium* of a hundred marks, whilst the number of the shields was reduced. The dividing up of knights' fees into parcels rendered impracticable the furnishing of troops for real purposes of war; frequent alienations brought the system of holdings entirely into disorder. In all directions the insular position of the country showed its influence. The military conditions existing on the Continent, the hundreds of baronies and fortified towns all competent to wage private warfare, the countless castles, the short campaigns and petty sieges were not to be found in England. The few castles and fortressed towns were as a rule in the hand or under the control of the King.

*** The complicated details are given more exhaustively in my "Geschichte des Self-government," 1863, pp. 144–204. The modern English historians appear inclined to accept this conception of the development of their constitution. Thus Stubbs, "The principle of amalgamating the two laws and nationalities by super-imposing the better consolidated Norman superstructure on the better consolidated English substructure, runs through the whole policy. The English system was strong in the cohesion of its lower organism, the association of individuals in the township, in the hundred, and in the shire. The Norman system was strong in its higher ranges, in the close relation to the Crown of the tenants in chief whom the King had enriched" (Stubbs, i. 278). "The peculiar line of Edward's reforms, the ever perceptible intention of placing each member of the body politic in direct and immediate relation with the royal power, in justice, in war, and in taxation, seems to reach its fulfilment in the creation of the Parliament of 1295" (Stubbs, ii. 292).

Hence had resulted a state of affairs, in which the summons of the feudal militia only appears as a mustering. The owners of the knights' estates pursue, each according to his inclination, either agriculture, or military service for pay, or again the highly esteemed State service. A standing feudal militia only appeared essential for the border lands, which accordingly retained a different military organization. Hence as early as the time of Henry II., the system of the purchase of immunity by scutages had begun. This purchase of discharge becomes gradually the rule; after Edward II. the scutage becomes absorbed in the general ground-tax. A complement was now found in the county militia, in the form in which the Assize of Arms (1181), had remodelled it, but which had not as yet attained to its full effectiveness. It now receives an elaborate code of organization. With the consent of Parliament the statute of Winchester, 13 Edward I. c. 6, declares the *liberi homines* who were capable of bearing arms liable to serve in the militia and bear arms from their fifteenth to their sixtieth year. In like manner as in the constitution of the Roman centuries, five degrees were formed of incomes of 15, 10, 5, 2–5, and under 2 pounds of silver. Every possessor of lands of an annual value of £15 or 40 marks in money was to provide himself with a breast-plate, an iron helmet, a sword, dagger, and horse; of £10 to £15 the same, except the horse; those possessing £5 to £10 in land, a quilted doublet, an iron helmet, a sword and dagger; those with 40*s.* to 100*s.*, a sword, bow and arrows, and dagger; those worth less than 40*s.* in land, a sabre, pike, and small weapons; those of less than 20 marks in personal property, similar weapons. By this rating according to money value, the possessors of knights' fees, citizens, free tenants in villeinage, and householders, are ranked together in degrees; the wealthy freemen of the boroughs also, without regard to landed estates. At the same time the more special provisions of the Assize of Arms (Henry II.) continue in force; the King, by virtue of these provisions, causes those bound to serve to be registered and taxed by his commissioners, and the dis-

obedient to be punished. In every hundred a chief constable is appointed; in the old tithings and *villatæ*, the village bailiff is generally made a petty constable, and receives in addition to his old magisterial functions, a new military office. An inspection of the troops ("view of armour") is to take place twice a year. In the interests of the general peace the militia stood at all times under the orders of the sheriff. When war threatened, however, the King sent a commission of men experienced in war to bring the militia of the district "into military discipline." The double relation that now existed, that of a claim of the Crown to feudal services arising from the feudal bond, and to the service of the national levy, by virtue of the militia code, was for a long time turned to account somewhat arbitrarily, in spite of the manifest unfairness of making claims upon the communities for equipping and maintaining the soldiers, in addition to the heavy taxation of the boroughs and freeholders. Under Henry II. and Richard I. the militia burden was frequently reduced to this extent, that every two men bound to military service had to equip and maintain a third, or every three a fourth, or every eight a ninth man. But the *régime* of the nobles at the beginning of Henry the Third's reign repeatedly demanded with less consideration a forty days' service at the expense of the townships, or of the county, or else the supply of munitions of war and provisions. Under Edward I. and Edward II. these equipments at private cost were frequently required. (1)

(1) An official report by Sir Robert Cotton contains a description of the methods of raising soldiers in this transitional period (cf. manuscript in the Cotton Library, Julius f. 6). Under Henry III. one man was to be furnished for every two acres of land, to do service for forty days, and at the public expense of the township (Dors. Claus. 14 Hen. III.). In the following year the men of the knights' fees down to twenty shillings yearly value were ordered to provide themselves with munitions and provisions for forty days at the expense of the county (Dors. Claus. 15 Hen. III. m. 8). In 27 Henry III. the like services were demanded for the campaign in Gascony (Rot. Vasc. 27 Hen. III.). In 1 Edward I., there was a levy of heavy-armed troops provisioned by the county. In 4 Edward I. one man and munitions for seven weeks were required from each township. Under Edward II. there were repeated mobilizations *sumptibus propriis*. In 10 Edward III. a levy of knights takes place, and a definite number of horsemen were ordered from

Against this system, but above all, against the employment of the national militia upon foreign service, a perfectly intelligible opposition at last arose. According to 1 Edward III., stat. 2, c. 5 and 7, no one shall be compelled to go beyond his shire, except when necessity and a sudden irruption of foreign foes into the realm requires it. According to 25 Edward III., stat. 5, c. 8, no one shall be compelled to go beyond the realm under any circumstances whatever,—nor beyond his county, except in cases of urgent necessity,—without the consent of the Parliament. The regular service was thus restricted to the county, and to the purposes of national defence. All that went beyond this was dependent upon the sanction of Parliament. Both statutes were further confirmed by 4 Henry IV., c. 13; and especially the Commission of Array is so framed as to prevent the introduction into it of new penal clauses. After the statute of Edward III., the militiamen were, as a rule, maintained at the expense of the Crown, with the exception of the mere wars of defence waged against Scotland and Wales. After this there became manifested in the military department, as also in all the other departments of State, the gradual transition from specific performance into money payment, by the formation of a body of paid troops from select numbers of feudal and county militia. (*a*)

the counties with the option of a satisfaction in lieu thereof, according to a fixed scale. In 11 Edward III. a levy is made of feudal vassals and men of the boroughs and townships from their sixteenth to sixtieth year, the incompetent and aged to contribute to the expenses; the objections raised by Parliament were rejected. In 16 Edward III. every man possessing lands to the value of £5 is to furnish an archer for the King. In 20 Edward III. a levy is held of the towns and townships. In 24 and 25 Edward III. London furnishes three hundred archers.

(*a*) At the commencement of Edward the First's reign the most unequivocal traces are found of the inefficient formation of the feudal militia, and of the king's embarrassments in consequence; *e.g.* in 5 Edward I. "Parl. Writs," 213. At the commencement of the reign of Edward II. a so-called *statutum de militibus* was published in the old fashion as an ordinance of the commander-in-chief, which was issued on the occasion of a parliament, and was enrolled by command of the King (Reeves, ii. 288). The contents of the statute had, however, chiefly to do with the obligation to take up a knighthood, and financial interests, and not the military discipline of the feudal militia. The chief progress made at this period lay in the development of the county militia. The constables of this militia occur apparently as early

The constitution of an army for foreign service at this period was as follows. The mass of the horsemen was still made up of the feudal nobility and their followers, under the titles of barons, knights, esquires, and men-at-arms, among which last class were included all heavy-armed troops without distinction of rank. It was still the office of the marshal to arrange the heavy cavalry into equal squadrons (*constabulariæ*). The infantry, on the other hand, which was as a rule five to eight times as strong in numbers, formed companies of a hundred men each under constables or "*centenars*," and was divided into pikemen and billmen, and heavy and light archers. In the Welsh campaigns it appears that troops in uniform were already met with, and companies of labourers, miners, and gunners occur as new elements. After the parliamentary enactment of 25 Edward III., it was found more convenient to raise such troops partly by commissions for the enlistment of volunteers in the counties, and partly by contracts undertaking to supply them. The King contracted with an influential lord as *condottiere* for the supply of greater or smaller bands, at a daily rate for man, horse, equipment, and arms. The external decay of the feudal militia side by side with this new system does not imply that together with the feudal array the martial spirit and training of the great landowners had ceased. But a division of labour was introduced, according to which the duty of serving in the heavy cavalry was undertaken by preference by those who felt fitted for it, especially by younger sons, in return for pay. Altogether this division leads to the enhancement of the power of the great barons. Those of the lesser vassals and of the younger sons whose inclinations turned towards military service, marshalled themselves again in the form of a retinue round the petty courts of the earls and great barons. And here again were formed standing companies of sub-vassals and landless men of a chivalrous turn, skilled in the art of warfare, dressed in the colours

as Henry III.; the designation of "petty constables," for the provosts of the magisterial tithings is only customary from the time of Edward III.

and bearing the badges (liveries) of a landowner, and in which the *comitatus* of Tacitus revives in a new shape. The history of the French war shows us that the better tactics, mobility, discipline, and arming of these masses gained the day over the cumbrous feudal armies of France. The fact of the simultaneous existence of the feudal and the county militia enabled the strong features of the old and new system to be combined, and rendered it possible to select for the cavalry and infantry the most warlike and the most skilled elements. The retinues of the great barons served like standing *cadres*, not merely to keep the heavy cavalry in constant training, but also to perfect them in tactical manœuvring, so that in this direction also the English cavalry, in spite of its moderate numbers, was a match for the unwieldy masses of the French. (1[b])

(1[b]) Compared with the decaying feudal system of the Continent, where the landlord, as such, still led his tenants (with all the defects which arose from the heterogeneous character of the companies, the difficulty of tactical disposition, and want of discipline), this system, blending the feudal militia and the national array, was decidedly to be preferred. On the Continent the deficiencies were counterbalanced by the fact that the enemy suffered also from the same faults. The still slow progress made by missile weapons produced in the arming of the troops a tendency towards strengthening the body-armour, which, in spite of all the experiences of the Crusades, remained always the same, and became at length a caricature. King James might well say in praise of armour that it not merely protected the wearer, but prevented him also from inflicting any injury on others. Yet an attack of horsemen against infantry was regarded as irresistible until the invention of the new tactical infantry arrangement. On the Continent this arrangement was first seen in the new system of the phalanx, in the glorious struggles of the Swiss against Austria and Burgundy. In England it was manifested in the formation of a light infantry, which, exercised to act in few lines, checked the onslaught of the cavalry for the moment by palisades, and through the more perfect construction of their bows, by discharges thick as hail pierced the heavy armour with murderous effect, and then stormed with furious speed into the breaches they had made. When the two systems encountered each other in the great French wars, the English method showed its decided superiority. The contracts made with lords and knights as to furnishing soldiers are to be found in great numbers in the archives from Edward III. down to the close of this period (Grose, "Military Antiquities," vol. i. 71 *seq.*). As instances of the composition of such armies, I confine myself to the following: At the embarkation of 1346, there were 2500 knights and 30,000 followers and infantry soldiers (Villani, p. 943). At the siege of Calais, thirteen earls, forty-four barons and bannerets, 1046 knights, 4022 esquires, constables, and *centenarii*, 5104 *vintenarii* and mounted archers, 19,954 foot-soldiers and Welshmen ("Archæol. Brit.," vi. p. 213; Pauli, v. p. 657). At the levy under Henry V., a duke was to appear with fifty horses, an earl with twenty-five, a baron with sixteen, a knight with six, an esquire with four, a bowman with one horse (Rymer, p. 227 *seq.*). In the

At the close of this period the relation of the two systems of armaments had become reversed. The ordinary and uniform national defence is the county militia. The old feudal militia still consisted principally of the numerous followings (liveries) of the greater Crown vassals, that is, of very heterogeneous elements; but it was employed as an active force now only in the northern counties on the Scotch border. The necessary military stores had been since the time of Henry III. deposited in the Tower of London, under the charge of a *ballistarius*. In this period we meet with an *attiliator ballistarum* for military weapons and accoutrements, and a *galeator*, armourer, bowyer, and fletcher, who were subsequently united in the fifteenth century under the Master of the Ordnance.

II. The exercise of the *judicial power becomes connected with the county* in a new fashion by means of the now established system of jury-courts. At the close of the former period the three principles of the new judicial system had become applied, which now were raised to permanent fundamental laws:

The separation of the administration of justice from the question of evidence;

The concentration of the administration of justice in the persons of learned judges appointed by the King;

The constitution of juries of the hundreds and counties, appointed by a royal officer, to determine the question of fact.

The institutions of benches of judges, which, from the

council protocols under Henry V. and VI., the constitution of the smaller detachments destined for field and garrison duty were altered as need required. In the cavalry the banneret received three shillings, the knight two shillings, the esquire twelve pence daily pay; the foot-soldiery, the archers, carpenters, and other labourers sixpence and less. Here everywhere the foot-soldier appears treated separately, and the relation between the light-armed and heavy-armed, the horseman and the foot-soldier, was no longer that between master and servant, but between officer and soldier. A military summons in the writs of 9 Edward II. shows us that the number of the combatant Crown vassals, or, at all events, of those liable to be called out, amounted almost to 200. For individual contributions relating to the military organization of this period see further in N. Harris Nicholas, "The Siege of Carlaverock," in 23 Edward I. (London, 1828, 4to), with a reprint of the "Rolls of Arms," by Jn. Wright, (London, 1864); White, "History of the Battle of Otterburn," in 1388 (London, 1857).

time of Henry III., appear somewhat more permanently filled, now become connected with the counties by deputations of their members. In civil proceedings the blending of the two was primarily caused by the complaints occasioned by a plurality of commissions of evidence at the central court. To redress the delays and expenses thus occasioned, Magna Charta had promised that the system should be reversed, and the justices of the realm were to come into the county—an arrangement which, however, proved hardly practicable in the method then pursued. This system was definitely organized by the statute of Westminster 2, 13 Edward I. c. 3: "Justices of Assize shall be two justices of the realm, appointed on oath, who should take to them one or two honourable knights of the county." The sheriff henceforth summons the jurors only *pro forma* to the next terminal sittings at Westminster, "unless before that" (*nisi prius*) on a certain day the justice of assize appear in the county, which from this time was regularly the case. After further consolidations by 27 Edward I. c. 4; 12 Edward II. c. 3; and 14 Edward III. c. 16, the whole of the functionaries of the central courts enter into an organized connection with the civil assizes through the medium of periodical commissions.

An analogous course was taken by the criminal jurisdiction, which remained for a considerable time in a more unsettled state. The deputation of special commissioners for penal justice, "justices of oyer and terminer," still often took place, since political struggles as well as the combination of penal justice with the police control and the financial interests, caused greater variations in this department. Gradually, however, the commissions of *oyer* and *terminer* addressed to the justices of the realm, as well as the more comprehensive commissions of gaol delivery, became the established form in which the penal justice of the central courts entered into connection with the juries of the county. Through the regular union of the civil and criminal commissioners, the newer *ordo judiciorum* was carried out in practise. The separation of the question of law from the question of fact now forms the

fundamental character of the English judicial system in quite a different fashion from that indicated in the *judicium parium* of Magna Charta. For these reforms there were accordingly needed express enactments of Parliament, as being deviations from the charter. But after standing instruments for uniting and developing the common law had been gained in the central courts, the consolidation of juries, which had been formed in the earlier period, took place in a threefold direction.

(i.) The civil jury existed after the *assisæ* of Henry II., by virtue of statute only, for the originally enumerated cases; and then in this form, that four knights of the shire appointed for the purpose, and twelve jurors elected by them, were to decide the principal question at issue. These form accordingly a court of decision "*per judicium parium vel per legem terræ.*" Practical necessity had, however, extended the proof by commissions of twelve persons on oath as "*jurata*" to the whole civil procedure. In this more accessible and cheaper form their verdict became limited to the question of fact, and the method soon became so generally followed that the circumstantial *assisa* with the four knights is less and less frequently used. At an early period, also, proceedings in evidence are taken before the civil jury; at first in the form that the witnesses who were present at the reception of documents, combined with and delivered their information to the jury; and again, that they, independently of the jury, gave their version of the facts at the judicial sittings. The transition to examination of witnesses in another fashion, and to other modes of taking evidence, was brought about in the practice of the courts. A taking of evidence before the jury was tolerably well developed at the close of the Middle Ages (Fortescue de Laud. c. 26).

(ii.) The grand jury was primarily connected with the county assemblies which the royal justiciaries had to hold at periods which became more and more regular. Their presentment duties consisted in summoning the individual hundreds, and causing the presentment made them to be inquired into and confirmed by a special jury of each hundred. This procedure

must, however, have appeared a waste of time and labour, and from the desire for a quicker despatch of business a change took place, the first traces of which are visible in the year 1368. It had been found practicable to utilize the full assemblies of the county court for these *inquisitiones* also, as a grand inquest, or grand jury, in the face of which the presentment juries of the individual hundreds gradually decay. The great committee of the county absorbs the committee of lower instance, and makes use of the presentments of the communities, as also the information of the individuals, only as means to promote justice. In this manner accordingly the grand jury takes upon itself the duty of indictment, and in the face of it private prosecution more and more disappears. When about the same time the institution of justices of the peace had been established, a similarly constituted grand inquest was also applied to the quarter sessions of the justices of the peace.

(iii.) The petty jury in criminal cases, which Bracton and Fleta represent as a continuation of the presentment jury with partial changes in its composition, severed itself from the other in the course of practice. The principal separation was brought about by 25 Edward III. c. 3, according to which every *indictor* (member of the jury of presentment) may be challenged in the second jury (verdict-jury). And when soon afterwards the court of presentment became merged in the great jury which was formed of the county assembly, both jury courts appear under the names of the "grand" and "petty" jury in permanent separation. No reliable trace of a hearing of witnesses and other modes of taking evidence before this jury, can be discovered in the whole of the Middle Ages. It is still always regarded as an inquisitorial commission of the community which has upon oath to try the indictments confirmed by the grand jury, and finally to decide from their knowledge of the vicinage and from information there collected "*an culpabilis sit vel non.*" And on that very account "neighbourhood" was an essential condition, and after the practice had become looser in the

time of Edward III., it was required that at least six hundredors, and in Fortescue's time four hundredors should sit upon the verdict jury. (2)

In this way the fundamental maxim, "*Veritas in juratore, justicia et judicium in jure*" (Bracton, 186, *b*) became realized. Common to all three forms is the tender regard paid to the equality of the parties and the impartiality of the jurors. This system of "fair trial" is the best and the most enduring basis of English judicial life. After it had been carried out on a great scale, the necessity arose of consolidating the duty of serving on a jury. Originally the jurors in the county as also in the sub-districts were chosen from among the traditional lawmen, that is, they were *legales milites, liberi et legales homines.* But the duty of serving as juryman was by its nature built upon a broader basis. For judging an habitual participation was necessary, which was only prac-

(2) An old fundamental error considers this thorough organization as connected with the provisions of Magna Charta, whereas the guarantee of the *judicium parium* in Art. 39 of the charter actually formed an impediment to reform. Much as such reform was practically required, public opinion adhered as tenaciously as ever to the Anglo-Saxon principle of constituting a court of men and *pares* of the hundred, appointed to find the verdict. But the opposition was, as might be expected, most keen in criminal cases; and the slower course of development of the verdict jury can be also thus explained. The practice of the courts found a remedy at first in this way, that it caused the accused to submit voluntarily to the verdict of a *jurata*, in place of the customary proof. In case the accused refused to do this, no other expedient was known, but that of an administrative measure, the so-called *peine forte et dure* (above, p. 190). In this there was an evasion of the principle by a sophistical trick, which, practised on the Continent in much greater dimensions, leads to torture, whilst in England it remains restricted to a middle course, and is in later times even acknowledged in this form by Act of Parliament (*vide* Palgrave, ii. 189, 190). By this firm adherence to the old *ordo judiciorum* it is also explained why in the criminal assizes such importance was still attached to appointing a number of knights of the shire, as *pares*, on the commissions of justices. The bare fundamental idea of the jury is, that the establishment of fact in the trial (the determination of the bases of the judgment of the court) should proceed from the district and community concerned, because the knowledge possessed by the vicinage of persons, things, and circumstances, cannot be dispensed with, and least of all, where the presiding justices only come at stated times from long distances, and it is an established principle that they shall be strangers to the county. At the close of this period Fortescue in his "Laudes Legum Angliæ" regarded the criminal jury still only as a practical institution for judicial proceedings on evidence. The annual participation of thousands in the practical administration of justice became politically important; as also was the newer and more uniform distribution of the judicial burden among knights, freeholders, and boroughs, which has become a fundamental principle of representation in Parliament.

ticable for the greater landowners. In stating the question of fact, an exact knowledge of the district of the *vicinetum* was requisite, as well as personal integrity, and for this the smaller freeholders were as well qualified as they were indispensable. Participation in delivering judgment might appear as an important political right; the summons on the newer commissions of evidence appeared as a newly established service, and the taking part in such could scarcely become a subject for class-jealousy. The danger now rather lay on one side in the burdening of the poorer classes with this duty, and on the other in the diminished trustworthiness, the corruptibility, and timidity of these elements. Therefore it was necessary to fix upon an average scale of landed property, to which the duty of serving on a jury should attach. In dealing with the evil result: "that otherwise the rich would go free and the poor constitute the juries," the stat. Westminster 2, c. 38, enacts first that only freeholders of twenty shillings value in land should be summoned to the *assisa*. By 21 Edward I. stat. 1; 2 Henry V. c. 3, this rating is doubled; only persons of forty shillings income from land (or one-tenth of the rating of a knight's fee) should be summoned. (2[a])

The fact that the royal justices of assize presided in it preserved at this time the character of the county court as a court of common law. In contradistinction to the ordinary sittings of the county court, prelates, barons, knights and freeholders still appear before the royal justices of assize; from each township twelve citizens, and from every village the village bailiff with his four men. This suit royal of the prelates and barons, which was again expressly confirmed by the Assize of Clarendon, hindered the courts of common law from being divided into separate courts for the nobles,

(2[a]) This has been at all times the practical side of the question. The wealthy bribed the sheriff, in order to get free from service; the parties endeavoured to entertain and bribe the poorer jurors. In 1 Edward IV. c. 3; 1 Richard III. c. 4, the reasons propounded speak of the abuse of poor and unconscientious persons sitting on the presentment jury of the sheriff. In other places acts of violence are spoken of with which the jury are threatened by the litigants (22 Ass. pl. 44). The gradual disappearance of a *Magna Assisa* composed entirely of knights (of which we have an instance as late as the year 1348) is connected with the aversion against serving on a jury.

knights, citizens, and peasants; and even though the upper classes display a constant tendency to be quit of the suit of court in the county court, and though the statute of Merton permits representation by proxy, and the statute of Marlborough releases persons of higher rank than a knight from appearing in the sheriff's tourn, yet a liability to appear on special summons still remains. The origin of a privileged court in England is confined to the jurisdiction of the peers over their members which sprang up under Edward II.

After all these changes the old office of sheriff has in great measure lost its independent jurisdiction. In this capacity it remains only an instrument of the supreme court for functions in which a provincial organ is indispensable, for instance for the issue of summonses, for executions, and for the empanelling of a jury. Under Edward I. the sheriff's judicial competence for civil matters is restricted to petty suits not exceeding forty shillings; to which are added his inquisitorial, police, financial and administrative functions. Through its police control, its privileges, and its fees, the office is however still sufficiently important to be the object of solicitation. Manifestly in order to fall in with the wishes of the knighthood, the attempt was therefore twice made to fill the sheriff's office by a county election. The first attempt was made in 1258 by the statute of provisors, but ended in pure party elections, and was subsequently annulled. The second attempt (28 Edw. I.) had for its result that after seven years the sheriffs were obliged to be deposed *en masse*, and others appointed in their places. The suffrage proved inapplicable to the judicial and police officers. The sheriff accordingly remains an under-officer of the Exchequer and the King's court, and is proposed for the King's sanction by the treasurer, the chancellor, the barons of the Exchequer and the *justiciarii* (9 Edw. II. stat. 2), as is done in effect at the present day. He had to possess sufficient real estate to carry his responsibility, and was not allowed to farm out his office. (2[b])

(2[b]) The appointment of the sheriffs who are proposed by the treasurer, chancellor, and the judges (9 Edw. II. stat. 2), was fixed at a time in which

The indirect effect of these magisterial institutions, was finally the further decay of the regular hundred and manorial courts. No new law, no reform, was extended to them; the absolute validity of judicial documents in evidence is as a rule confined to the royal courts of record; the want of a jury, of a right of distraint, and of summary penal jurisdiction, was enough in itself to make them impracticable, and to bring the jurisdiction over the *villani* (copyholders) more and more completely to the regular courts. Even where a landowner has been granted as a franchise the right of appointing a bailiff by the *clausula "non omittas,"* 13 Edward I. c. 29, the sheriff may execute every order of the court in such franchise, if the bailiff does not do it properly. Of course fragmentary remnants of the old *régime* still occur. The *infangtheft* and *outfangtheft* were, under Edward I., occasionally put in force by manorial courts, and as late as 1285 two cases occur in which a court baron passes sentence of death for felony.

III. *The exercise of the police power* becomes connected with the county in a new way, by the office of **justice of the peace**, which had been formed after a long series of experiments. The parliaments of this period begin with complaints of the insolence of the magnates, and of feuds and brawls, which after the times of the Barons' Wars appear again periodically. Hence there resulted together with the militia code a formal police-code in the statute of Winchester, 13 Edward I., which begins with the words: "As day by day robberies, murders, arson, and thefts, occur more frequently than they ever did

the monarchy was involved in a conflict with the great barons on account of the appointment to the great offices of State. This statute secured on the one hand the constitutional influence of the council, and on the other a certain impartiality in making the appointments. The idea was that the chief officials of the permanent council should exercise the right of proposal. In 14 Edward III. stat. 1, cap. 7; 23 Henr. VI., cap. 8, accordingly the Lord Chancellor, the Lord Treasurer, the President of the Council and the three presidents of the central courts of law were mentioned. In Fortescue's time all justices of the realm were wont to meet together with the great officers and members of the council of State. These are all only variations in the course of business of the council of State; in like manner as the custom of proposing three candidates to the King also originated from practice. As to the still considerable fees attached to the office of sheriff, cf. Thomas, Exchequer, 51.

before"—therefore the old police regulation touching the "hue and cry" was strongly enjoined, the landlord was made responsible for the guests he harboured, the hundred for reparation of damage done within its district, and a more extensive duty to do militia service, and a system of watch and ward introduced. But there was also a concurrence of various social reasons for extending and multiplying the province of the police-power. Town and country life in England had not become quite separated each from the other, and there existed free intercourse to such a degree that the communities, having become mistrustful on account of their liability to make compensation, had frequently to require that suspicious characters should find security for keeping the peace and for their good behaviour. With the comparatively early decay of villeinage and with the introduction of free transactions of hiring and letting, the intimate bond between property and labour became loosened in many places. By free intercourse and unfettered industry, the unstable relations between property and labour became welded together, and capable much earlier than on the Continent of being regulated by comprehensive laws. The numerous industrial enactments, which in Germany must be looked for in the police regulations of towns, and in the statutes of guilds, appear here as subjects of general legislation; at first as royal *assisæ* and ordinances, and later as parliamentary enactments. To these belong the legal fixing of the price of bread, beer, firing, and other necessaries of life, *assisæ venalium* (at the same time with regulations against adulteration), the most important of which is called the *assisa panis et cerevisiæ* (51 Henry III. c. 5), all of which are continued as periodical tariffs. Regulations affecting the bakers' trade, the preparation and manufacture of leather and woollen cords, the preparation of malt, brick-making, the coal trade and sale of firewood, market police-rules, and the general provisions of a trade-code form a very complicated legislation. (3) To

(3) The scope of these laws is best seen in the modern repeal acts, such as 49 George III. c. 109, which affects forty statutes dealing with the woollen

these were added the police laws affecting labour, which stand in the place of the "law of socagers," and of the guild and urban police institutions on the Continent. The first statute of labourers, 23 Edward III., cap. 1, was promulgated after a great national calamity, which had diminished the number of working hands, and increased the ordinary rate of wages. By it the working men are ordered to serve every employer of labour at the customary wages. Connected with it there became defined in practice the notion of combinations, that is, of prohibited unions for obtaining an increase of wages. Further connected therewith is the prohibition of giving alms to able-bodied beggars. By 12 Richard II. c. 7, every labourer is forbidden to leave his place of abode without a certificate of the magistrate that there is a good reason for his doing so; whosoever is found wandering about without such certificate can be apprehended and put in the stocks. Those who are unable to work shall return, in case of need, to their birth-place to be supported there. According to the strength or weakness of the successive reigns so does the rigour of the labour police vary (13 Richard II. cap. 3; 14 Richard II. c. 1. 2; 2 Henry IV. c. 5; 4 Henry IV. c. 15; 5 Henry IV. c. 9; 11 Henry IV. c. 8; 9 Henry V. c. 9, stat. 2; 8 Henry VI. c. 24; 27 Henry VI. c. 3; 17 Edward IV. c. 1; 1 Henry VII. c. 2; 3 Henry VII. c. 8). But a warning to exercise moderation existed in the rebellion of the peasants under Richard II. The statutory tariffs of bread and beer were intended in some measure to act as a counterpoise to this. Elements of a *police des moeurs* were also contained in the comprehensive meaning of the term "common nuisances" by which disorderly and immoral houses were punished; in laws affecting luxury in dress, food, and other extravagances —the last-named in connection with fantastic practices which the paid soldiery brought back with them from the French wars. To this head belongs the dinner law (10 Edw. III. stat. 3), *de cibariis utendis*, which allowed for dinner and

manufactures from 2 Edward III. downwards (cf. 19 and 20 Viet. c. 64). A kind of general trade code resulted from 3 Edward IV. c. 4.

supper only two courses; the great laws against luxury (37 Edw. III. c. 8–14) relating to dress and meals, repealed, it is true, in the following year, but partly revived under Edward IV. Supplementary to the above there existed besides a summary penal power residing in the King's Bench, as *custos morum*, as well as the right of the magisterial police to enforce the finding of a security for good behaviour in cases of offensive acts of public immorality. The idea of *nuisance* embraces, besides, a number of disputes between neighbours; among others also the first forms of highway regulations, and a highway police. Further connected with these follow hunting and fishing laws in an almost innumerable series.

To deal with this complicated system there had existed hitherto merely the sheriff's tourn and the courts-leet. Although the Great Charter had withdrawn from the *Vice-comes* the royal criminal accusations, yet there still remained to him the first interference, the taking of security, the police *inquisitio*, as well as the functions of police magistrate, where petty criminal cases were concerned. The investigation in these courts was, however, somewhat different from the proceeding of the present day. It did not take place publicly before the community, but in and by the community itself, with constant summonings of bailiffs and lawmen, with examinations on oath as to knowledge, ignorance, and belief. It was not only that this constituted the heaviest burden of the judicial duties of the people, the community having to be summoned *en masse;* the further and main fault was unmistakable, that the terms and forms of a court were inadequate for the preventive purposes of a police of this description, which presupposes a much greater amount of activity. The local courts-leet were on this account just as little equal to the performance of such tasks as were the sheriff and his under-bailiffs. Experience made it ever more clearly felt, that assemblies of the community neither *in pleno* nor yet in committees could conduct a police administration in the form in which it was then constituted, owing to the extended character of the system of preservation of the peace and the

police laws for trade, labour, and morals. So soon as a police system by virtue of express enactment, takes the place of patriarchal regulations, the carrying out of these regulations by single officers, and their more summary enforcement, must lead to the creation of a judicial office.

As early as the reign of Richard I. a first attempt was made to associate with the sheriff, district-deputies, *custodes placitorum coronæ*, or coroners, who were described in the capitula of 1194 as *custodes placitorum coronæ*. Their functions consisted in keeping a watchful eye on the royal taxes, rights, and dues, and are probably identical with those of the later coroners. Edward I. gives these officers exact instructions how to proceed with a commission of inquest chosen from the neighbourhood in the case of unusual deaths. After 28 Edward III. c. 6, they were chosen in the county court from among respectable landowners, and presented to the King for his appointment. This first formation did not develop itself further; it confined itself to inquests as to causes of death, to cases of embezzlement of treasure, and to assisting the sheriff in certain cases. The monarchy was probably not inclined to extend the powers of these chosen officers. It is likely that in early times, as a consequence of the inadequate principles of their election, they proved themselves inadequate officials. (3[a])

(3[a]) Without doubt the *coronator* occurs under John and in Magna Charta; and is described in detail in the law books of Bracton, Fleta, and Britton, c. 1. As to their procedure, a very thorough ordinance, 4 Edward I. *de officio coronatoris* was issued; and it is also described in the *statutum Walliæ* (12 Edw. I. c. 5). In addition to the itinerant financial commissioners, other persons also, who were presented from the county itself to the King, could exercise a control over the maintenance of the rights of the revenue and the Crown; out of this there was formed an *inquisitio* after the manner of a sheriff's tourn, with commissioners of the township, which was to intervene in the vacations between the periodical court days, whenever a speedy investigation on the spot was needed. Violent deaths and cases of treasure trove thus became the principal province of the coroner. According to the oldest indications we possess, this officer was to be presented to the King by the chancellor, the current formula for which, a "*breve de corona tore eligendo*," is very ancient. The jury to be summoned by the coroner is to be collected from the nearest villages to the *inquisitio* (*per eorum sacramentum inquisitionem faciant dehomine occiso*), and it was regarded as understood, that at least twelve jurymen must be present, and twelve be of one accord in giving their verdict. Special qualifications were not required of this *ex tempore* commission.

Towards the end of Edward the First's reign, in disorderly times and districts, a kind of court-martial under *justices of trail baston* began to be instituted, which was also in later times occasionally repeated, but met with opposition on account of its too summary character. Shortly after Edward II. ascended the throne, *conservatores pacis* were appointed in every county, who were to reside continually in their counties and visit all parts of the same, "to watch over the observance of the police code of Winchester, and the royal decrees relating thereto." This also remained only a passing attempt. But a very serious occasion for the appointment of local police magistrates arose at the accession of Edward III. After the deposition of Edward II., his criminal spouse and her followers feared that general disorder would ensue. They therefore caused by ordinance (1 Edw. III. c. 16) the appointment in all the counties of police magistrates, chosen from the ruling faction—"*bonnes gens et loyaux assignées à la garde de la paix*," to act as assistants of the sheriffs and of the itinerant justices. In the following year police-magistrates were appointed with a commission of *oyer* and *terminer*, that is, with real penal powers. But these again ceased when the occasion for their institution disappeared, and the change of party took place. The idea of the appointment of police-magistrates from the district of the county had in the meantime become popular. In 18 and 20 Edward III. new attempts and new proposals were made. In 21 Edward III. the commoners make a proposition to the King, to appoint about six police magistrates in each county —two lords, two knights, and two men of the law. The difference of opinion on the matter lies principally in this, that the King and council cleave to the royal prerogative of appointment, whilst the estates lay the greatest weight upon the election of great landowners. But in the meanwhile the disputes with the labouring classes had arisen, which necessitated the statutes of labourers (23 Edw. III. c. 1; 25 Edw. III. c. 8). For the putting of these laws into execution according to their spirit and their letter commissioners endowed with

extraordinary powers were appointed, who were to hold their sittings four times a-year in each county. The idea of applying the principle of election to the statutes affecting labourers could not for a moment be entertained. These police-magistrates, appointed by royal nomination, proved successful, and agreeably to this precedent, after long experimental formations, there ensued at last in the year 1360 the appointment of district police-magistrates, as a permanent institution, by 34 Edward III. c. 1. "In every county of England there shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy men of the counties, together with some learned in the law, and they shall have power to restrain offenders, rioters, and other barretors, and to pursue, arrest, take, and chastise them according to their trespass or offence; and to cause them to be arrested and duly punished according to the law and customs of the realm, etc., etc., and also to hear and determine at the King's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid." (3[b])

(3[b]) The origin of the office of justice of the peace is treated of at length in Reeve's History, ii. 472; iii. 216, 242, 265, 290; iv. 154. The old work of Lambard, "Eirenarchia, or the Office of Justices of the Peace," is still in use in various editions, from 1581 to 1619, 8vo. Still more detailed is Dalton's "Justice," 1618, last edition 1697 fol., which contains historical notices, and much confused matter. Historical excerpts from Hardy are contained in the "First Report on Constabulary Force," pp. 192–202, (1830). The historical notices contained in Blackstone are taken from Lambard, especially the vague and confused expression that there existed, according to common law, *conserratores pacis* either by custom or by feudal tenure, with the obligation to maintain the peace, or such as had been chosen from the people in the county courts (Lambard, 15–17). By the proceedings of 1 Edward III. c. 16 the choice of the guardians of the peace was first of all taken from the people and then given to the King (Lambard, 20). This passage, which has been copied again and again, must have given rise to the erroneous idea that there existed in England elected or manorial justices of the peace. Officers chosen by the people, occupying the magisterial office of justices of the peace, have never existed in England since the Conquest. Traditions of this sort, which are also repeated in Coke, Inst., ii. 459, 558, 559, date from the constitution of the Anglo-Saxon townships. For the Norman period they are, on the showing of the records, false, and incompatible with the whole course of the development of legislation touching justices of the peace. The elected *custodes pacis* of this period are partly the coroners, partly the recruiting officers of the militia, partly the constables in the police administration, and partly anomalous personages, with whom in times of civil war experiments were made for a short time. These are officers having the right of first interference, of prosecuting the presentments before the courts of law,

After many new proposals had been made, Parliament demanded that the police magistrates should hold common sittings four times in each year; this was granted, and by 36 Edward III. c. 12, it became law. In the ensuing year a petition was addressed to the King to the effect that he might be pleased to allow the knights and burgesses in Parliament assembled, to elect "the justices of the peace, and the justices of labourers and artificers," and that the persons so elected should not be again removed. The reply ran, that Parliament might propose the persons, but that the King would appoint according to his pleasure. Once again, in 50 Edward III., a petition was presented, praying that Parliament might appoint the justices, and that they should not be deposed without the consent of Parliament. The reply to it ran, that the judges should be appointed by the King and his (permanent) council, and herewith the election question was settled for ever.

In this period, also, the more honourable title "justices" occurs in addition to, or instead of, the older term, "*custodes pacis*." The form of the commissions was at the commencement of Richard II.'s reign already similar to that of our own day, and became gradually consolidated as a comprehensive instrument of penal justice, and police, and especially the newly promulgated police-laws. The duties of the commissions of peace were at this time twofold:

at most with the right of enforcing the giving of security; but not royal justices of record with the right to pass judgment, and endowed with the numerous extraordinary and discretionary powers of justices of the peace. Just as little have manorial justices of the peace ever existed in England. The usurpations of the nobility under the House of Lancaster, and at the time of the Wars of the Roses, only produced confused conceptions of the kind, and in a few cases also hasty and impolitic grants. But when a case of this kind, touching the grant of the privilege of appointing justices of the peace, occurred in a charter for the Abbot of St. Alban's, and came on for trial before the King's Bench (20 Hen. VII.), the court declared, in concurrence with the Attorney-General, that the King was not authorized to concede by such a grant, to any person, the right of appointing royal justices, seeing that this was a prerogative inseparable from the Crown. Lambard himself confesses (i. c. 3) that "all offices for the maintenance of the peace are originally derived from the King, and that no duke, earl, or baron, as such, has a greater authority to maintain the peace than any private man."

(i.) The preservation of the peace according to common law; that is, apprehension, arrest, enforced bail, and all other police functions, which traditionally lay in the jurisdiction of the Norman provincial magistrates.

(ii.) Analogous functions according to the statute of Winchester, the statute of Westminster, and the later laws relating to the police control over trades and labour, which became more numerous with each succeeding generation. Actual criminal penalties were only inflicted by them when they sat in a body in quarter sessions, with the assistance of a jury. Their commission was drawn up on this matter in such general terms, that they exercised a concurrent criminal jurisdiction with the itinerant justices. In another direction, there were especially reserved to them, by the framing of the statutes, jurisdiction over a number of smaller offences against the regulations affecting trade, morals, and labour. No intention could yet be perceived in this materially to restrict the application of the jury. But the framing of the more recent police laws, gave them also in their own persons a comprehensive jurisdiction, which was to be exercised without a jury. It was not until the statutes of the following period that this became extended to an administration of summary justice without a jury, even against the accused person who denies his guilt. (3c)

The justices of the peace themselves must, according to the petitions addressed to Parliament, be chosen from the great landowners, whilst King and council look upon knowledge of the law as an essential qualification. As a body, they were now according to local needs really composed of both elements. The influence of the nobles under the house of Lancaster first introduced a fixed qualification (18 Hen. vi.

(3c) According to 15 Richard II. c. 2, their duties were to establish the facts of violent dispossession; according to Henr. IV. c. 4, sec. 2, "the justices of the peace are for the future to have the power to hear on oath all manner of labourers, servants, and their masters, and artificers, touching all things which have been perpetrated by them against the previous ordinances and statutes, and to punish them accordingly on their own confession, as if they had been convicted upon inquest." The statutes of the following period extend this gradually to an administration of summary justice without a jury even against the accused denying his guilt.

c. 11). The justice of the peace is to possess lands of the yearly value of £20 (the rating, in those times, of a knight's fee); however, when sufficient landed proprietors were not available in the county, who were skilled in law and its administration, the Lord Chancellor was authorized to place on the commission other persons learned in the law. By virtue of this clause, the rivalry between the landowners and the justices of the peace learned in the law or "the quorum," continued down to the eighteenth century. The renunciation of their right to legally fixed daily allowances, which became more and more the custom, at last brought about the disappearance of the mere professional officials from the commission of peace. (3[d])

(3[d]) In the clause of the commission, in which "two or more" justices of the peace are authorized to try and to judge, the proviso is added, that among this number one or more should always be appointed by name ("*quorum aliquem vestrum A. B. C. D. unum esse volumus*"). Those thus appointed are the members skilled in the law, who on this account are technically called "the quorum." In later statutes it is also specifically determined whether the justice of the peace is to act independently, or whether he is to act with the assistance of a colleague learned in the law. This office of justice of the peace, filled both by lawyers and landowners, is in fact only a new combination of elements that had long existed, a new blending of property and office. The King could from time immemorial appoint justices of oyer and terminer to hold the criminal courts; by the new arrangement he is obliged to appoint them by preference from among the resident landowners of the county. The itinerant justices had their *point d'appui*, or centre of gravity, in the royal council, and in the central courts of law; the justices of the peace have theirs in the county, and form in their periodical sittings a corporate body, which now becomes permanently connected with the juries of the district, and forms newly organized district administrations for police purposes, in the widest sense of the term. In the commissions of the itinerant justices, in addition to the justices of the realm, lords and knights of the county were also appointed, but only as secondary personages, whose participation soon became a purely nominal one; in the commission of the peace the professional officers are only colleagues and assistants learned in the law, who gradually retire before the permanent influence of the great landed proprietors. As the non-acceptance of stipends (after 14 Richard II. c. 11) was declared to be required of the honour of lords and bannerets, the non-acceptance of wages altogether, soon appeared called for by considerations of honour, and thus the rush of lawyers and small landowners to the commission of the peace diminished. The great landed proprietors thus obtained compensation on a greater scale for their decaying manorial courts. But for the practical purposes of the police control, the requisite stability and the necessary force was thus gained. Inasmuch as the justices of the peace were appointed for the district of the county, and as their official jurisdiction was from the first to be exercised "as well within as without the franchises," they held authority over the disconnected manorial districts. And herein already we perceive the principal reason why the justices of the peace gradually ousted the old courts-leet.

This new system of police control, as it steadily progresses, thrusts into the background the old institutions, and first of all the district police court of the sheriff. The *turnus Vicecomitis* remains, it is true, side by side with the justices of the peace. To the sheriff is also reserved the right of first interference, of inquisition as well as criminal jurisdiction in petty penal cases, with the co-operation of the townships. So far the relation remained one of rivalry, but to the disadvantage of the sheriff, whose unpopularity still continued, and whose police jurisdiction was doomed to further decay in consequence of the inconvenient change of office from year to year. Sheriffs were deprived of the important powers of preliminary inquiry by 1 Edward IV. c. 2, 3 (1461). Their functions were restricted to a jurisdiction of first instance, and the taking of indictments, and the actual order of arrest: all further proceedings had to be left to the next quarter sessions. But, on the other hand, the execution of penalties still remained to the sheriff; for which function the organization and financial administration of the sheriff's office was originally framed, and for which they remained suitable.

The same course of development was taken by the manorial and borough courts-leet, which had branched off from the sheriff's tourn. For a certain time they still competed with the office of the justices of the peace; that is, they acted by means of a continued summons of the assemblies of the townships for the purposes of the inquest and police convictions. They still continue, but in principle are restricted to their old jurisdiction at common law, except where the criminal jurisdiction over new penal offences has been expressly given them by statute law, as was done frequently in the province of police regulations affecting labour and trade. In this condition of free competition, the court-leet (except in very few places where accidental circumstances kept it alive) becomes gradually overshadowed and choked by the newer and more vigorous institution of justices of the peace. These were at all times accessible, whilst the court-leet was only opened twice in each year, and then only for a

short time. The justices of the peace gain from generation to generation new and effectual penal powers, whilst the court-leet, as a rule, remains restricted to a cumbrous inquisition, and to the penalties of the common law. At the close of Edward the Third's reign (51 Edw. III.) Parliament again prays that no penal offences shall be sent to the justices of the peace, which ought to be decided in the leets of the land-owners and boroughs. The answer ran, that the laws which had hitherto been enacted (police regulations) could not be maintained, if this petition was granted. From that time the decay of the leets silently proceeded.

The subordinate functions of the maintenance of the peace, which were exercised as a jurisdiction of first instance in the townships, tithings, and *villatæ*, by reeves and the lawmen of the district, in the form of committees of the township, together with the duty of giving informations, passed gradually into the office of the reeves of the township, who now subordinated themselves to the justices of the peace as they formerly did to the sheriff's tourn. These inferior functions follow the course of development of the higher ones. In the place of the indicting township, there now appears at the sessions of the justices of the peace, a tithing-man, who, from the time of Edward III., bears the title of constable, a name taken from his militia functions; he makes his presentments there, and keeps watch over the peace in his district (just as the chief constables did in the hundred), with the old duties of a guardian of the peace, and various new official functions which have been successively imposed upon him by the police laws relating to trade, labour, and morals. (3e)

(3e) It was a division of labour, by virtue of which the duty of making presentment, as well as that of apprehending the breaker of the peace, passed to the constable alone. According to the statute of Marlebridge (52 Hen. III.), the whole township was only to appear in case of murder; in all other cases the sheriff was to be content if the provost appeared with four men. In the private leets, too, the failure of the lawmen to appear was never rigorously regarded. The current business accordingly fell more and more into the hands of the reeve alone, who came to be often called "constable," in consequence of his official duties in the militia. In the statutes we meet with this title first in 12 Edward III. It appears to be regarded in the war-

IV. **The connection of the financial administration with the county** is bound up with a system of local taxation which dates from earlier times. The dues of the county unions consisted for a long time only of services and matters rendered personally and in kind, whilst the central government had even in early times adopted a properly organized revenue system. Supplementary payment in money is already found in Norman times, in consequence of the innumerable amerciaments and fines. The oldest payments in money were fines inflicted for the neglect of duty by individuals or communities; others served for procuring the necessary ways and means for the fulfilment of a common duty. Directly or indirectly, taxation was thus a complement of the judicial, police, and military services owed by the greater and smaller unions, in the imposition of which the pattern of feudal burdens pervades the lower spheres as well, distributing taxation according to the scale of freeholdings, houses as well as land, and profitable rights. In the practice of administration three grades became formed, which although they are only incidentally mentioned in the oldest statutes are presumed to have existed.

1. The "tithing" or "town-ley" (levy) served to discharge the amerciaments and fines of the township, and answered to the duties which the Norman constitution laid upon the tithings. Such were amerciaments for escaped offenders, for the harbouring of breakers of the peace, outlaws and those for whom no security had been given; amerciaments for neglecting to keep the paths, highways, drains and smaller bridges on roads belonging to the township in repair; fines for the neglect of accusations before the court. Where a special court leet had been granted to the township, the expenses of keeping the stocks in repair and other outlays connected with

like times which followed as the more honourable title, and now drives the older designations from the popular language. Towards the end of the fourteenth century, it had become the ordinary official title of the reeve (cf. 2 Edw. III. c. 3; 3 Edw. III. c. 14; 25 Edw. III. stat. 1, c. 6; 36 Edw. III. stat. 1, c. 2). In the west of England, however, townships are still found with two tithing-men, of whom the first is constable of the King, the second simply "head-borough" (Lambard, "Constables," pp. 9, 10).

the local court were added to these: in somewhat later times again, amerciaments for offences against the militia code, such as failure to furnish troops, neglect to keep the weapons and archery butts in repair, etc. Naturally such contributions were raised by the local authorities, that is, by the provost with the four men who represent the township at the sheriff's tourn. After the name "constable" appears, in the fourteenth century, in the place of that of provost, the name "constable's tax" is the prevailing designation for the same thing. The manner of distribution affected the same persons upon whom the military, judicial, and police duties altogether fell, that is, the freeholders, and consequently the lawmen of the court leet.

2. The hundred-rate served for the payment of the amerciaments and fines of the hundred, for the maintenance of the hundred-court, to make good the disbursements of the chief constable after the introduction of the militia system, for the keeping of the bridges of the hundred in repair, and for contributions to the county as we shall mention below. It appears to have been apportioned by the bailiff (later by the chief constable) among the individual townships, where we meet with it again as "town cess," that is, as a common burden. The oldest statutory mention of it is in 13 Edward I. c. 6.

3. The county rate serves for the amerciaments and fines of the county, for certain expenses of the county court, prisons, bridges, and certain military expenses. The raising of the county contributions appears to have taken place originally in such a manner that the sheriffs distributed them over the hundreds. By 3 Edward I. c. 16, 18, it was indeed enacted that the itinerant justices should raise these amounts from the persons liable to pay; but as such individual rating probably appeared to be impracticable, the older manner remained the prevailing one, which was to distribute the payment over the whole hundreds, and from these to divide it among the townships, by which method a fixed and fair proportion in the contributions was attained. But when the proportions had been definitely fixed, the whole business of assessing the taxes fell upon the townships.

Such being the chief causes for the levying of imposts, there arose accordingly a certain practice of assessing the neighbour by the neighbour, to which people became accustomed by the Norman inquest. The increasing expense of keeping the roads in repair, and of the mustering of the militia, as well as, later on, the furnishing of armed contingents which was expected of the districts, and many other local necessities, caused on all sides the institution of committees of assessment. (4)

Meanwhile the time drew near when the employment of commissions of the townships could no longer be disregarded for the State taxation also. The raising of *scutagia* by the *Vicecomes* took place indeed according to the feudal registers; but even here the frequent change of ownership and sale of plots led to many disputes and to much arbitrary action. Still more numerous were the complaints of unfairness in making the *tallagia* assessments. Hence at an early period, instead of the sheriff, the itinerant commissioners of the Exchequer were charged to negotiate with knights and boroughs on these points. For great disputes as to rights of the Crown "juries of inquiry" were frequently appointed. But when the Assize of Arms (1181) introduced service in the militia, with classification according to property, Henry II. could not avoid employing a number of knights and *legales homines* sworn in for the purpose of acting as commissions of the townships. When the raising of a Saladin tithe (1187), the collection of Richard the First's ransom, and the levying of a

(4) As to the first formation of the county, hundred, and local taxation, compare the Report on Local Taxation of 1843, pp. 5–7, and the memoir of the Poor Law Board on Local Taxes of 1846, p. 45. The want of legal provisions as to assessments only proves that the general principles of the feudal and judicial duty decided the method. The report quotes as statutes which presuppose a local taxation, 52 Henry III. c. 24, touching the payments to be made by the township when their lawmen fail to appear at the accusation proceedings before the sheriff or coroner; and 25 Edward I. c. 12, 22 (Magna Charta), according to which no township was to be forcibly compelled to build bridges where this had not been customary at the time of Henry II. These quotations prove that the laws of the Middle Ages only occasionally touch upon these matters to remove individual abuses. But spontaneous growth prevails in no system of taxation. It was in this case the Norman system of government with its administrative system of fines, which had set the military, judicial, and police duties in motion, in accordance with the temporary necessities of the State.

general hide-tax in the same reign (1198) led to an entirely new assessment of taxes according to the amount of hides and of income, the appointment of knights of the shire and others was for practical reasons unavoidable. This system was continued under Henry III. For the assessment of the *carucagium* of 1221 two knights were to be chosen in full county court "according to the will and advice of the county court." For the income-tax of 1225 ($\frac{1}{15}$) the assessment took place on a sworn declaration of the person liable to taxation, disputes were settled by a jury, the amounts collected by the reeve and the four men, and paid to four knights of the shire of the hundred (Charters, 355). The income-tax of 1232 ($\frac{1}{40}$) was assessed by the reeve and four men elected by the township as "assessors" upon their oath (Charters, 360). The income-tax of 1237 was assessed upon the oath of the reeve and four men of each township, with the assistance of elected "assessors;" the assessment was verified by four knights and an ecclesiastic (Charters, 366). This method pursued by the assessment commissions continued as a rule uniformly under Edward I., and was among other cases employed in the towns for the assessment of the wool-tax that had then been introduced. After 25 Edward I. the committees of the township appear as a permanent institution. The ordinance prescribes that in each township four men shall be chosen, who shall report their assessments to the county authorities, who are thereupon to go from hundred to hundred and from township to township to hear complaints and to correct errors in the assessment. Nine years later (1306) it is decreed that a commission (jury of twelve men) of every hundred shall deliver their assessment to the assessors of the county. For this purpose they shall go from township to township and make with the provost and the four men a correct assessment. The assessment commission of the county proceeds again from hundred to hundred and from township to township, to see that no wrong has been done. But the more frequently the hundreds and counties agreed upon a fixed rate of contribution to the local taxes for the sake of simplification, the nearer did

the application of the like proportions to the State taxes come. In the eighth year of Edward the Third's reign a widespread assessment of individual townships at fixed sums had come into practice, and from that time it became the custom to assess boroughs and townships according to these proportions, which are taken as a basis for taxation as between the townships. The assessment and the collection from the individuals was left to the *communitas*. (4[a])

V. Now that the county-union had become a firmly organized entirety for military, judicial, police, and taxation purposes, it was further developed by the **extension of the system of district unions to a considerable number of boroughs**; in the majority of them in a more limited extent, but yet through the application of the same principles, so that the constitu-

(4[a]) The proceedings taken upon the first attempts at taxing the whole income arising from personal estate are treated of in Palgrave, "Commonwealth," i. 275. At these first attempts a threefold process was adopted: (1) All inhabitants (with the exception of the Crown vassals) were compelled to prove on oath the full value of their income, as was done in 8 John. (2) An inquest was appointed to test the case where the oath of the taxpayer was doubted or called in question, as happened in 9 Henry III. (3) By direct assessment by inquests, which are formed of townships or hundreds, in 16 Henry III., and then repeatedly occurring until Edward II.'s reign. In the course of this period the position of *Vicecomes* in the assessment had to be quite given up, as the reclamations against it were interminable. But the itinerant justices were unsuited to the duty on account of their deficient knowledge of places and persons. Thus also a permanent necessity compelled the adoption of the inquest system. Complaints that one was assessed too high and another too low, were also made to the Exchequer, out of which a writ of *æqualiter taxandum* was issued (Coke, "Inst.," ii. 77). The township, for its part, was competent to raise the amount of the tax by distraining movables and money (Heyburn *v.* Keylow Mich., 14 Edw. II., B. R. Rot., 60) or by civil action. The most important information as to the assessment of taxes under Edward I. we owe to the treatise of T. Smith, "The Parish," 1857, and especially the advantage of being able to make more correct use of the "*inquisitiones nonarum*." These *inquisitiones* (cf. Cooper, "Account," i. 286–293) arose under the stat. 14 Edward III. stat. 1, c. 20, by which one-ninth and one-fifteenth were voted to the King for the extraordinary needs of the State and for war purposes, and which in this case were fixed at one-ninth of the civic income, upon the ninth lamb, sheep, and wool-skin (the poorer classes being exempted). At the same time the clergy had granted one-tenth of their spiritualities and temporalities according to the rating of 1292. All this led to a complicated assessment, for which three successive commissions were now appointed. For each county respectable persons were appointed by name, to act as *assessors* and *venditors* for the assessment business, and who by sworn men assessed the ninth on corn, wool, and lambs; and then again the old Church tax and its relation to the ninth of the actual produce. The digest of the accounts for twenty-seven counties still exists in the Exchequer, and is printed as *Nonarum Inquisitiones* (1807, fol.).

tions of the boroughs resemble, on a small scale, those of the county.

1. In the militia system the boroughs are in principle incorporated with the counties, and furnish their contingents according to townships, parishes, and hundreds just like the country. For London, however, a separate militia system soon arose, owing to the fact that the county of Middlesex was included in the government of the city. A small number of other towns obtained in this period by charter the "right of a county," and together with it a special civic militia.

2. In the judicial administration a special court-leet had become in the preceding period the characteristic mark of the civic constitution. To certain cities a civil jurisdiction was also granted after the new pattern of judge and jury. But the more important civil and criminal cases were all decided by the itinerant justices with a jury of the county.

3. The police administration also shows in the cities a gradual overshadowing of the court leet by justices of the peace. The number of the cities in which at the close of the Middle Ages the court leet was still of importance was probably not very considerable. The place of the court leet is taken in very important cases by the justices of the peace for the county, whose jurisdiction is expressly granted "as well within as without the liberties," and therefore within the separate civic districts. The good understanding subsisting between the towns and the knighthood, as well as reasons of practical convenience, explain why on the part of the cities no opposition was raised on principle. Besides this, the respectable landowners and lawyers of the towns were also nominated as members of a commission of the peace. Nevertheless, the later city charters, after Richard II., were frequently framed with a view to a separate commission of the peace, whose quarterly sessions became an ordinary criminal court for which the town issued its own list of jurors. Side by side with this a rival jurisdiction of the justices of the peace for the county generally continued to exist. The special requirements of the market police were provided for

in a special department of the clerk of the market, which under the name of a "court of the clerk of the market" enacted penalties for certain offences against the market laws, and under the name of a "court of pie-powder" served for the decision of certain market disputes, and for the inspection of weights and measures.

4. In the local taxation system the smallest boroughs ranked as townships or parishes, though the majority ranked as hundreds. London and some others, on the other hand, ranked as counties.

The number of boroughs becomes according to this system considerably increased. Under Edward I. fifty-four new ones are enumerated; under Edward II., sixteen; under Edward III., twenty-eight; under Henry IV., three; under Henry VI., four; and under Edward IV., two; so that the number of those places which possessed a kind of municipal constitution at the close of the Middle Ages exceeded two hundred. (5)

(5) On the extension of self-government to the municipalities, cf. Gneist. "Gesch. d. Communal-Verfas." 194–204. With respect to the State government they are secondary formations. The exercise of magisterial authority could, from the nature of the public business, be only confided to larger unions. English self-government is accordingly based upon the counties and hundreds, that is, upon unions of districts and bailiwicks, and not upon townships. It is only the city of London that properly speaking has the character of a county. From this down to a number of small market-towns, the municipal constitution forms only an imperfect application of county self-government to a local union. The legal bases of the municipal constitution may, with Stephen and Merewether, be referred to the same heads as in the former period:—

1. The towns form a court leet or some other separate judicial district. It is, however, not sufficiently appreciated that by the introduction of the jury system and the justices of the peace, the form of the old judicial township was changed, and with it the participation of citizens also. The real life of judicial and police administration must be looked for in the assizes, the justices of the peace, and the jury. But the leet jury still retained a right of proposing the mayor or provost; and this right in process of time developed itself so far, that in some places the leet jury actually elects, whilst in others it only presents for election (Scriven, "Copyhold," ii. 860). In performing their police duties, the lawmen of the leet could also pass bye-laws which had the force of law within the district.

2. The boroughs are still in the position of *firma burgi*. It is, however, a fact not sufficiently appreciated by Merewether, that this relation was materially altered by the right of the counties and cities to grant taxes.

3. The class of burgesses still consists of the resident householders, who are included among those paying "scot and lot." The ordinances dating from the era of the house of Lancaster still recount the old characteristics of citizenship, such as being sworn to the King and the town; living by their livelihood, merchandise, or crafts; householding in their own persons and names; bearing tax and talliage, lot and scot.

These are the bases of self-government by which the central government now entered into a firm bond of union with the county government, by which the classes of society, though differing in their landed and industrial interests, now become united together to fulfil their political duties; and, filled with the consciousness of public duty and a common zeal for the general welfare, all gain the capability of taking part in the government of the country. The recognition of personal liberty by Magna Charta is followed by the political liberty which calls the existing middle classes to take part in the government of the realm in the form of county and municipal unions. The political self-consciousness thus strengthened, from this time onwards unfolds itself in its firm national individuality, and challenges comparison with the great civilized States of the Continent.***

It has been frequently remarked that the English towns have never attained to the importance of those of the Continent. Their striving after separation lasts only as long as the old *régime* of the Norman *Vicecomites*. So soon as those causes fell to the ground, thanks to the central courts and the altered position of the sheriffs, the towns remained unresistingly in the military and other systems of the county unity, and contented themselves with more restricted immunities. Their participation in the jury and in the commissions of peace, as well as equality in respect of taxation, kept them in active intercourse with the knighthood. Trade and industry moreover existed from time immemorial in the country also; conversely many landowners had also town houses. The administration of the provincial police magistrates gained respect and popularity. In short, the reasons are not found in England, which in Germany forced the cities to shut themselves off in fact and law and to become fortresses, in order to avoid sharingthe lot of the peasantry. Hence the municipal government in England was the reverse of that in Germany—it was the weaker part of self-government; and thus may be explained the somewhat subordinate position of the municipal deputies in the Lower House, though they exceed the knights of the shires in number.

*** The quiet but grand significance of this period is thoroughly appreciated by Macaulay ("History," cap. 1.): "Sterile and obscure as is that portion of our annals, it is there that we must seek for the origin of our freedom, our prosperity, and our glory. Then it was that the great English people were formed, that the national character began to exhibit those peculiarities which it has ever since retained, and that our fathers became emphatically islanders, islanders not merely in geographical position, but in their politics, their feelings, and their manners. Then first appeared with distinctness that constitution which has ever since, through all changes, preserved its identity; that constitution of which all the other free constitutions in the world are copies, and which, in spite of some defects, deserves to be regarded as the best under which any great society has ever yet existed during many ages. Then it was that the House of Commons, the archetype of all the representative assemblies which now meet, either in the old or in the new world, held its first sittings. Then it was that the Common Law rose to the dignity of a science, and rapidly became a not unworthy

Absolute rule is now superseded by a **constitutional government according to law**; a government which by means of permanent political institutions gives to the rights of the individual, and to the participation of the people in the government of the land, those guarantees which were aimed at in Magna Charta. The constitution of the Government and the division of power are now as follows :—

1. The ordinary administration of justice is consolidated in fixed judicial bodies, or central tribunals. These represent the most durable formation of the era of the rise of the estates (cap. 22).

2. The conduct of the highest political business becomes consolidated in a standing state council or permanent council (cap. 23).

3. The participation of the prelates and barons in the central government of the realm is fully established owing to their being periodically summoned to the royal council; in union with this they form the *Parliamentum* or *Magnum Concilium*, which at the close of this period has developed into an hereditary council of the Crown (cap. 24).

4. The participation of the *communitates* in the central government develops into a House of Commons (cap. 25).

The whole development of the government by estates of the realm confines itself, however, to the temporal side of the State, which is now confronted by the gradually increasing isolation of the ecclesiastical hierarchy (cap. 26).

rival of the imperial jurisprudence. Then it was that the courage of those sailors who manned the rude barks of the Cinque Ports first made the flag of England terrible on the seas. Then it was that the most ancient colleges, which still exist, at both the great national seats of learning, were founded. Then was formed that language, less musical indeed than the languages of the south, but in force, in richness, in aptitude for all the highest purposes of the poet, the philosopher, and the orator, inferior to the tongue of Greece alone. Then, too, appeared the first faint dawn of that noble literature, the most splendid and the most durable of the many glories of England." Upon the obscurity described by Macaulay as existing, light can in most cases be thrown from the fundamental bases of this political system.

CHAPTER XXII.

The Courts of Common Law.

The establishment of a definitely secured judicial system in the spirit of true monarchy begins with Edward I. The firmest barrier against arbitrary decisions under the personal government was formed in this period by three corporate official bodies under the names of Court of King's Bench, Court of Common Pleas, and Court of Exchequer. They may be designated the three ordinary Courts of Common Law, side by side with which certain special courts of the Norman feudal system still continued, to which I shall refer at the close of the chapter.

I. **The Court of King's Bench** had already under Henry III. become organized as a nearly permanent court, in which the King claimed the right to preside in person. This tribunal was on that account still to follow the person of the King as a "*Curia coram Rege ubicunque fuerimus in Anglia.*" With this condition, the court consisted of a bench of four or five *justiciarii*, whose president from Edward the First's time was called "*Capitalis Justicarius ad placita coram Rege tenenda,*" and may to a certain extent be regarded as a successor of the old high justiciary, but only for judicial business. In this court are combined—

1. The *placita coronæ* or criminal cases, extended so as to include petty offences, but in such a manner that, as a rule, the same cases can also be dealt with by the justices of the peace at the quarter sessions.

2. The police control, which was from the first combined with the exercise of penal justice; the judges are in their official capacity the supreme *conservatores pacis*.

3. The constitutional appeal from the lower courts; in this sense Bracton calls the judges "*capitales, generales, perpetui et majores, a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores*," that is to say, a higher tribunal for the courts of the land, with the exception of the Exchequer, which in its capacity of supreme court of finance, stands in the same rank with it. (1)

II. **The Court of Common Pleas** as a permanent court of law for civil actions between private persons, in which no

(1) The formation of the Court of King's Bench is intimately connected with the discontinuance of the office of *Capitalis Justiciarius Angliæ*. After the Battle of Evesham, Henry III. did not again nominate to this office. In 52 Henry III., however, Robert de Bruce was by patent appointed to be "*Capitalis Justiciarius ad placita coram Rege tenenda*," and from this time this is the ordinary title of the president of the King's court, who is no longer to be governor general of the realm, but only a representative of the royal power in its judicial branch (Foss, "Judges of England," ii. 135; iii. 18). The number of his assistant justices was under Edward I. as a rule four, in the later years of the reign three; under Edward III. at first three, and then again four (Foss, iii. 19, 342). Fortescue (writing in the middle of the fifteenth century) says, that four and sometimes five justices sat in the King's Bench. As to the jurisdiction of the King's Bench, cf. Reeves, ii. 247, 248. If the King was within the realm, the court, according to Norman custom, was certainly always obliged to follow him. Edward I. and Edward III. insisted upon this, in spite of the petitions of Parliament (Foss, iii. 339). Under Richard II. also a circuit was made to Coventry and Worcester. But in the second half of this period the sitting at Westminster became the rule of practice, with the reservation of a change of place in time of war and national calamities. The kings have never expressly renounced their traditional right of presiding in person. John, from the fifth to the sixteenth year of his reign, was frequently present at the sittings (Foss, ii. 4), and also held circuits in person in company with certain of his councillors. Henry III. also sat in person in judgment on certain important cases, and notably in an action brought against the burgesses of Winchester administered severe justice (Palgrave, i. 292). Under Edward I. and II. we meet also with isolated instances of the King presiding in person (Palgrave, Privy Council, 62). Circuits undertaken by the King, so long as the separate institution of itinerant justices lasted, occur until Edward III.'s accession to the throne (Palgrave, Commonwealth, i. 292). And even after the itinerant justices had ceased as a separate institution, the King sometimes took part in the circuits of the justices of his realm. Under Henry VI., on the other hand, it was, according to Fortescue, no longer "customary" for the kings of England to sit in court and deliver judgment themselves (Foss, iv. 215). Edward IV. is said to have once sat for three days in the King's Bench, but only "to see how his laws were executed" (Allen, Prerogative, 93). Hence we perceive that the monarchy was finally restricted to its old formal authority in the department of the administration of justice.

royal rights were involved had also, from Edward I.'s time, its special president, under the name of a *Capitalis Justiciarius*, and its regular seat at Westminster. To oppose the excessive centralization, the statute of Gloucester (6 Edw. I. c. 8) prohibited the royal central courts of justice from dealing with claims not exceeding forty shillings; these petty cases were reserved to the county and local courts. Nevertheless the number of actions had increased to such an extent that from the time of Edward III. the number of justices was augmented from three to six, and occasionally to seven. In answer to complaints from the estates, the assurance was repeatedly given that *communia placita* were no longer to be heard in the Exchequer. The administration of justice by the King in person was also given up in these cases. (2)

III. **The Court of Exchequer** now becomes separated, in its capacity as a financial tribunal, from the administrative central government of the Exchequer. The carrying out of the fundamental provisions of Magna Charta rendered a change in the administration necessary for a great part of

(2) The independent formation of the Court of Common Pleas is, according to the careful researches of Foss (ii. 160 *seq.*), of subsequent date to Magna Charta. The Germanic conception of the judicial office, and the desire to keep free from the influences of court favour or disfavour, showed itself more strongly here than elsewhere. The necessity of a fixed and determinate administration of justice in ordinary civil disputes has been most keenly felt, especially under John's system of government, who had, in the eleventh year of his reign, sat in judgment at not less than twenty-four places. This gave rise to the clause of Magna Charta "*Communia placita non sequantur curiam Regis sed teneantur in aliquo certo loco.*" Under Henry III. this assurance was acted upon in so far that civil actions were for the most part dealt with in a special division of the King's court, and indeed at Westminster. But it was not till after the accession of Edward I. that Gilbert de Preston was definitely designated as *capitalis justiciarius* of this division (Foss, iii. 20). The number of the assistant justices varied under Edward I. between four and six; under Edward II. was as a rule six; in 6-9 Edward II. a seventh was added to their number. Under Henry VI. the number once reached eight. The official name of this court is "*Commune Bancum*," and in contradistinction, the King's Bench is called "*bancum regis*," or "*bancum nostrum*." The assurance given in Magna Charta as to the fixed seat of this court of law was not followed out to the letter; a removal still took place frequently, and notably from Westminster to York (Foss, ii. 135, 175, 177 *seq.*; iii. 16; 343 *seq.*; iv. 13). But in the second half of the period the sittings at Westminster must be regarded as established by law. The limitation of its competence to claims exceeding forty shillings was rendered somewhat ineffectual by evasion by means of fictions (Blackstone, iii. 36). As to the limitation of the *communia placita*, cf. Foss, ii. 135.

the Exchequer business. Free persons and free property were at all times to be judged "according to the law of the land, and the customary forms of procedure." A number of Barons of the Exchequer accordingly associated themselves into a judicial body for this department of business, which may be compared with the judicial division in the German "Kriegs und Domänen Kammer" in later centuries. To make these judicial decisions independent of the influence of the heads of the department, the judicial division after Edward II. also received its own president or Chief Baron, who was as a rule chosen from among those persons legally qualified for the judicial office, and was often expressly appointed for life.

Notwithstanding this, the position of the court continued to be a somewhat subordinate one. Its members were usually appointed from among the higher officials of the Exchequer department, from whom it was difficult to eliminate the financial spirit. Hence it is the more readily conceivable that the retention of the old method of assigning ordinary pleas to the Exchequer now led to loud complaints. In 5 Edward I. a royal writ was addressed to the barons, which in general terms prohibits them from dealing with *communia placita*, as being contrary to the letter of Magna Charta. This was repeated in the statute of Rutland (10 Edw. I.), with the remark, that in this manner the King's suits as well as those of the people were unduly protracted. As, however (probably in consequence of the interest in the court fees), the rule was often evaded, it was again repeated in the *Articuli super Chartas* (28 Edw. I.), and then once more in 5 Edward II. In later times the rule was again evaded by fictions. Yet in substance a better state of civil and penal justice was attained by the separation of the courts, which could be no longer compared with the condition of things in the former period. (3)

(3) At this time the Treasurer and the Chancellor of the Exchequer are regarded as leading officers of the Exchequer, side by side with whom, for cases which were to be decided upon argument, a number of barons formed a Court of Exchequer Chamber. The appointment of a *Capitalis Baro* by

IV. **The continuous consolidation of the staff** and the course of business of the **benches of judges,** is further shown in the following alterations. The judicial benches gradually absorb the separately appointed itinerant justices. Under 13 Edward I. c. 30, the Justices of Assize and Nisi Prius were to be appointed from the sworn justices of the King. According to 27 Edward I. c. 3, 4; 12 Edward II. c. 3; and 14 Edward III. c. 16, every justice of the central courts and every baron of the Exchequer may, if he is a professional lawyer, sit as itinerant justice on any case, it being immaterial into which court the matter was introduced. Whereas the itinerant justices were originally *delegati principis*, they now gradually appear as *delegati* of the permanent courts. The commissions which were formerly separate were now assigned to them in union, and became more and more systematic. Under Henry VI. the maxim was established that every justice of assize represents the whole tribunal in which the action has commenced. Thus the most dangerous feature of the old judicial commissions disappears. About

royal patent only dates from May 30th, 1317 (Foss, iii. 196, 198; Thomas, Exchequer, 107, 108). The number of the assessor judges was four, five, or six (Foss, iii. 196; iv. 233). These assessors were as a rule promoted under-officials; their pay remained during the whole period far below that of the *justiciarii* (Foss, iii. 44). Only the office of Chief Baron was as a rule filled by *servientes ad legem*, whence also, according to 4 Edward III. c. 16, the Chief Baron can be appointed a justice of assize, "if he belong to the sworn serjeants of the King." It was not until the time of the Tudor dynasty that the barons were put on a perfect equality with the justices both in qualification and rank (Foss, v. 409; vi. 17). The more conceivable is it, that the public, as well as the lawyers, viewed with unwilling eyes civil actions brought into the Exchequer. By the *Statutum de Scaccario*, 51 Henry III. (1266), it had been already provided that the treasurer and the barons should bind themselves by oath not to interfere in the affairs of private individuals whilst they were engaged in transacting the King's business; excepting only complaints against officers of the Exchequer, who retain their exclusive judicial privilege in the court itself (Foss, ii. 196). But it was not until Edward I.'s reign that it was acknowledged, that the parties have a right to such non-interference according to the principles of Magna Charta (Foss, iii. 22). When in later times there arose out of the official position of the Lord Chancellor a new equity jurisdiction, which acted according to the principles of administrative justice without a jury, in addition to the judges, the chief of departments, *i.e.* the treasurer, and the Chancellor of the Exchequer, participated in this new arrangement (Thomas, Materials, ii.). The old Exchequer appears from that time to be dissolved into four divisions; which, however, are partly formed of the same persons: (1) The Court of Accounts, (2) The Court of Receipt, (3) The Court of Pleas, and (4) The Court of Exchequer in Equity.

the middle of Edward III.'s reign the special itinerant judges disappear before the ordinary justices of the central courts. In addition, it is true, special *commissions of oyer and terminer* were still addressed to the local judges as necessity required in turbulent times. After the introduction of the office of justice of the peace, however, the local criminal commissions acquire a permanent judicial form, and thus the organization of the judicial offices was completed. (*a*)

The higher judicial staff now forms a paid and learned official class, as a rule distinguished by titles, as knights-bannerets, knights, or knights of the Order of the Bath. A motion made in Parliament that it should itself pay the justices their salaries, was rejected. (*b*) As personal servants of the

(*a*) The statute 13 Edward I. and the following statutes aim at employing the whole staff of all the courts in the civil assizes: 27 Edw. I. c. 3 and 4; 14 Edw. III. c. 16. But with the circuits of the justices of assize a general *commission of oyer and terminer* became now more and more regularly combined, addressed to the Lord Chancellor, certain high officers of State, barons, the justices of assize and their representatives, for dealing with all crimes and a large number of offences, supposing that they have been committed and have been presented in the county. But the right accorded by the statute of Westminster 2 of appointing special commissions for special cases still remained reserved. By 2 Edward III. c. 2, the assurance was given that such commissions should be regularly issued to justices of the realm, and only in urgent exceptional cases to other persons (Coke, Inst., ii. 419; iv. 152). This was followed by a more extensive *commissio ad gaolas deliberandas*, for clearing the county prisons, in which the separate prisons were named under the great seal. A further *forum deprehensionis* was thereby originated, the first-named commission only embracing a *forum delicti commissi*. Hence, as early as the reign of Edward III., the staff of the special itinerant justices diminishes (Foss, iii. 359–360). They are last mentioned in the years 1333 and 1349. Pecuniary interests also tended towards the same end; as every justice of the realm in his capacity of justice of assize obtained the considerable addition of £20 to his salary. The commissions of *oyer and terminer*, which were still specially appointed, were only to be appointed in urgent cases, and then in an impartial manner, not by the magnates, and not by the parties, but by the authorities themselves (2 Edw. II. c. 2: Coke, Inst., ii. 419; iv. 152). According to 20 Richard II. c. 3, no man is to be justice of assize or of gaol delivery in his own county, and no "magnate of the realm" is to sit with the judges in the assizes.

(*b*) The personal position of the justices of the realm shows us their honourable standing, nearly on a par with that of the highest officers of the realm. Personal disrespect towards them was punished with great rigour (Foss, iii. 43). Their salaries remained during this period comparatively uniform, £40 for the chief justices, forty marks for the puisne judges and the chief baron. The justices and the chief baron always received an additional pay of £20 as being justices of assize, and many judges besides received additional emoluments. Under Henry VI. the chief justice of the King's Bench had 180 marks; the chief justice of the Common Pleas 140 marks (Foss, iv. 227). The official costume was the same for the whole staff of

King they are paid out of his personal income, and subjected to his personal penal power. For example, Edward I. deposes his chief justice, Hengham, and inflicts a fine of seven thousand marks; the other justices were fined from three to six thousand marks for extortion, and probably, also for corruption. This penal jurisdiction was not questioned in the century embracing the reigns of Edw. I., II. and III., and was repeatedly put in force. But still more stringent was the precedent made in Richard the Second's reign, when the justices took part in the feud of the great nobles, and returned a doubtful opinion as to a royal ordinance. After the failure of an attempted *coup d'état*, all who had been implicated in delivering the opinion were condemned to death by Parliament for high treason, and the chief justice, Tresilian, was executed, whilst the sentence of death passed on the rest was commuted into one of banishment; the legality of this proceeding was also maintained at the accession of Henry IV. This important event left behind it for later times the impression that the independence of a State tribunal required the judicial office to be strengthened by the power of the landed interest, which support was in process of time found in the Upper House. (*c*)

judges. As to the very solemn oath taken by justices, cf. Foss, iii. 360. The justices were selected from among the number of the graduated advocates, *i.e.* King's serjeants. Even in the preceding period Foss reckons among 206 *justiciarii* about 125 men of the legal profession. Under Henry III. out of 100 *justiciarii* he only finds eleven of whom it may not be assumed that they have practised in some way or other as advocates. In this period it can in almost every individual case be definitely shown that the justices have been advanced to their position from the legal profession. In conformity with the old principles of a *judicium parium*, the justices receive the honour of knighthood, and usually even the higher rank *tanquam baneretti* (Foss, iii. 362, 364).

(*c*) The personal responsibility of the judges was derived from their position as delegates of the King invested with his personal judicial authority. Their appointment is accordingly not merely as a rule subject to revocation (*durante bene placito*), but they are also subject to the King's personal penal jurisdiction, which was apparently preceded by an inquiry by an assembly appointed for the purpose (Foss, iii. 262). In a very summary and hasty manner Edward III. proceeded to dismiss and arrest several justices (Foss, iii. 341) in the year 1340, and again five years later for a more serious cause (Foss, iii. 365). In later times disciplinary punishments had almost disappeared by reason of irregularity in the conduct of the business of the courts. But a more serious side to their responsibility showed itself in 10 Richard II. Two justices were at that time murdered in a popular tumult, and a third was executed for high treason. Robert Tresilian had allowed himself to be employed, agreeably to the personal

The ordinary course of the civil and criminal justice in individual decisions had after this time attained that steadiness and stability which was in keeping with the spirit of Magna Charta. The law to be applied has now the distinct character of "judge-made law." From the thirteenth century dates the definite distinction between *common law* and *statute law*. The latter is the law proceeding from royal ordinances and resolutions of Parliament; the former is that created by the blending of the Anglo-Saxon customary law with the Norman feudal system, and the older maxims in the judicial administration of the *curia regis* and the county courts. The further development is now found in the central courts. "The common law rests in the breast of the judges of the court of common law;" it is a judge-made law from the very beginning of this period, and in so decided a form that the authority of the law books very soon dwindles, while the collections of precedents, or year books, become the living source of law. To maintain the unity of this law, analogous principles are formed to those of the German common law: no customary right can maintain itself against the statute law; the custom must be *legitime præscripta*—that is, must have existed anterior to Richard I.; it must also be *rationabilis*—that is, practice excludes such customs as are in antagonism to the leading principles of the law of the land.

wishes of the King, to bring about a counter-revolution. A defeated party sought for this purpose to gain the decision of the highest judicial authorities, that an ordinance formerly issued in conformity with the law was illegal, and "the authors of it guilty of high treason and punishable with death." The Lord Chief Justice, who had already shown himself servile to the power of the day, collected his justices in all secrecy and haste to deliver the required opinion. The *coup d'état*, however, completely failed; the Chief Justice fled, was apprehended, condemned by Parliament to death for high treason, and executed on February 19th, 1388. The other justices were also put on their trial by the Lower House, in spite of their excuse that compulsion had been used towards them, and were in like fashion condemned to death and to confiscation, but the sentence was commuted into banishment. See as to these events Foss, iv. 3, 4. 102–108. The later judicial staff remained so far outside the great party feuds, that even at the change of dynasty under Henry IV., Edward IV., Richard III., and Henry VII., the former justices were confirmed. Under Edward IV. only the two Chief Justices were excepted, of whom one was already a fugitive (Foss, iv. 380). The dread felt by the justices of a collision with Parliament is notably shown in their refusal to give any opinion as to the extent of the personal privileges of the High Court of Parliament in 32 Henry VI.

A natural effect of the institution of judicial benches was the development of a special legal profession. About the time at which the central courts became permanently fixed at Westminster, we find the first traces of inns of jurists, at first comprising students, advocates, and under-officers promiscuously, but still (like the courts of law themselves) on a great scale, and with a strongly prominent *esprit de corps*. In 20 Edward I. the first attorney's code was published; according to which the Chief Justice was to admit a certain number (about 140) of efficient "*Attornati et Apprentitii qui curiam sequantur*," and exclude all others. Under the name of Inns of Chancery, there then became formed small law schools for the preparatory study of the law; somewhat later the practising advocates combine, and form the four Inns of Court that still exist. In Fleta's work we meet with professional degrees in *servientes, narratores, attornati, apprentitii*. A statute (4 Henry IV. c. 18), orders an examination of all attorneys by the judges, and a registration of their names upon a roll. About the same time the higher class of advocates begins to separate itself more decidedly from the lower class of attorneys, and to form in the four inns of court a sort of university. In conformity with the system of guilds there arises the degree of mastership, of *serviens ad legem*, serjeant-at-law, *doctor juris;* which is conferred by royal writ, and forms an intermediate step to the class of official judges. The serjeants are appointed as substitutes for the justices in the assizes, as such receive a salary, and are afterwards advanced to the bench. Two *Attornati Regis* for guarding the royal privileges are met with as early as the reign of Edward I. Towards the close of the period, after Edward IV., the two Crown advocates were distinguished by the titles of King's Attorney, and King's Solicitor. In 11 Edward IV. there appears for the first time the solemn official title of an "*Attornatus Generalis in Anglia cum potestate deputandi clericos ac officiarios sub se in qualicunque Curia de Recordo.*" (*d*)

(*d*) The development of a special legal profession is at once the cause and effect of the refined form of actions at law. It was impossible for the

The procedure and the staff of the central courts still remain formally connected with the chancellor. From his office as *officina justitiæ* proceed the writs commencing actions, and all commissions under the great seal. As *clavis regni* the chancery of the realm is accordingly open at all times. The number of regular writs of daily use (writs *de cursu*) had increased to such an extent that in 12 Henry III. fifty-one of them were sent to Ireland. Five such *formulæ actionum* (*de recto, mortdauncestor, novell disseisin, de nativis, de divisis faciendis*) could even under King John be issued by the chief justice without reference to chancery. These writs are accordingly no longer writs of grace, but *formulæ actionum*, which are granted to litigants upon proper demand. Under Edward I. the assisting counsellors of the chancellor were

parties to conduct such actions in person. The clergy had formerly been the counsellors both in the household and the law-court; "*nullus clericus nisi causidicus.*" For many reasons the papal throne now wished for a less frequent employment of the clergy. Even Richard I. had been obliged to dismiss his Archbishop of Canterbury from the office of chief justice; and in the provincial councils it was determined "*ne advocati sint clerici vel sacerdotes in foro seculari.*" Class jealousy had a similar effect. The noble Normans had in quite early times enjoyed a certain education in the practice of the law; laymen of lower rank filled numerous situations as clerks, in the Exchequer, with justices, sheriffs, and bailiffs of every kind; and the Norman administrative law shows us that the laymen thus educated certainly had little more to learn of the *clerici*. Now, about the time that the central courts became established at Westminster, inns for lay-jurists began to be formed. Under Edward IV. a student in the inn required £28 yearly; the nobility sent their sons thither "in order to keep them from vice, and to educate them in music, dancing, history, and other accomplishments." A modern compilation of all the historical records of the origin of the advocates' inns is given by Foss (ii. 200; iii. 46 *seq.* 370–390; iv. 195 *seq.*, 251 *seq.*). It is, however, impossible to form a clear picture from these fragmentary notices. In 18 Edward I. st. 4, there only appears the designation "*countour.*" In 33 Edward I. *countours, attournees, apprentis*; in 28 Edward I. c. 11, *contours e sages gentz.* 14 Edward III. c. 16 calls the class of serjeants-at-law substitutes for the justices of the realm for the assizes. It was not until towards the close of the period that Fortescue gives us more connected information. At this time ten smaller inns of Chancery had been formed, side by side with which stood the four great inns, Lincoln's Inn, Inner Temple, Middle Temple, and Gray's Inn, which provided the higher education for the practice of the law. No one was to be admitted to the degree of serjeant-at-law "*qui non in prædicto legis studio sexdecem annos ad minus antea complerit*" (Fortescue). It was bound up with such expensive ceremonies, and imposed so many restrictions from considerations of honour upon the practice of an advocate, that it was frequently refused (Coke, Inst., ii. 214; Foss, iv. 223), but was a requisite qualification for all justices of the King's Bench and Common Pleas. The mention of an *Attornatus Regis* begins with the commencement of Edward I.'s reign; in most years two *Attornati Regis* were spoken of (Foss, iii. 44, 45), both with a small salary of £10.

also allowed to issue in plain cases new *actiones utiles* (writs *in consimili casu*), but in more difficult cases only after obtaining the consent of the members of Parliament learned in the law. (*c*)

V. The *jurisdictio ordinaria* thus formed does not, however, exclude a system which still continued in a restricted degree, viz. **the system of special courts**, a continuation of the Norman method of the administration of justice. These are the military, the Court Marshal's, and the forest courts.

1. The military jurisdiction of the high constable and marshal had proceeded from the regulations for the feudal militia, and since the creation of hereditary feudal offices had under that name attained a fixed form, though only with a limited scope. Even in our day there exists in the archives a roll of *placita exercitus regis* dating from 24 Edward I., in which the high constable and marshal presides in the name of the King. An application to it of the forms of the county jury could, of course, in war times be never thought of. However, in 2 Richard II. the Commons endeavoured nevertheless to extend the provisions of Magna Charta to this department also. They petitioned the King that this court should not decide on cases of treason and felony, "seeing that the said court decided according to the law of arms, and not according to the common customs of

(*c*) As to the commencement of an action by writs, cf. Palgrave, Privy Council, pp. 16, 17. At the close of the Middle Ages the number of the admissible formulary writs *de cursu* had already considerably increased, as is shown by the treatise *de natura brevium*, dating from Edward IV. By 36 Edward III. c. 15 it was enacted that proceedings by parol and decisions of the courts should be in the English language; whilst the registrations and protocols of the courts should be couched in the Latin official language. A connected picture of the practice as it existed under Edward I. is afforded by the law work of Britton, written in French, which has been republished in a critical edition (Nichols, "Britton," London, 1865, 2 vols.). This new edition regards Britton as a condensed adaptation to later ideas of Bracton, which must be placed after 1290, and is somewhat more recent than Fleta's work. As to the other sources of law of this time, cf. Biener, Das Engl. Geschw. Gericht., ii. 286–298. From Edward II. date the collections of the decisions of central courts, which, under the name of Year Books, extend through two hundred consecutive years, in presence of which the use of the law books (notably those anterior to Britton) almost disappears. The criminal procedure is simple in comparison with the civil. The whole of the working time of the justices of the realm was at this period confined to the hours of the morning from eight to eleven o'clock (Foss, iv. p. 226).

the country." In 13 Richard II. c. 2, the assurance is given that no dispute shall be dealt with therein, which can be dealt with in an ordinary court according to the law of the land, but only "contracts and other matters relating to records of arms and war, within and without the realm," reserving an appeal to the King. However, the right of the King remained undisputed to order in time of war military courts with summary procedure for all manner of offences to be held by the high constable or marshal, or their deputies. A *curia militaris* of this description is frequently mentioned under Henry IV.; it was continuously constituted upon French soil, and even in the commission appointing the high constable (Edw. IV.) the King commits to him: "*plenam potestatem ad cognoscendum et procedendum in omnibus causis de et super crimine laesæ majestatis, cæterisque causis quibuscunque, summarie et de plano, sine strepitu et figura judicii.*" Apart from an irregular use made of it in the violent times of the later wars of the Roses, the military jurisdiction in actual time of war continued as a constitutional institution down to the Petition of Right under Charles I. (1)

(1) The military courts contain the elements of a chivalrous martial law. The legal equality of the classes in private law, however, and the divided interests of the knighthood, did not allow of any further expansion of a special martial jurisdiction. But in consequence of the French wars and their contact with the nobility of the Continent, a collision of class feelings with the common law had unmistakably come to pass. Nobles and knights demanded the retention of the knights' court, at all events "in affairs of honour and for the maintenance of the degrees of rank;" especially for disputes touching arms, precedence, and other family distinctions; whilst the common law of the central and county courts did not take cognizance of these objects, and especially not of satisfaction for simple affronts. For a considerable time longer the knights' court exercised a real jurisdiction; in it especially duels had a place for affairs of honour which, "for want of witnesses, could not be decided otherwise," as in the quarrel between Norfolk and Henry of Lancaster under Richard II. Even in the middle of the fifteenth century two cases occurred: in 1446, a duel between an armourer of London and his journeyman, under the authority of the High Constable and Earl Marshal; in 1453, a duel between John Lyalton and Robert Norres, on account of an accusation of high treason. At the latter the High Constable presided, before a vast concourse of people in Smithfield. But as a *jurisdictio extraordinaria* the court only enters *in subsidium* by writ, and in this weakened form is called a "court of honour." When the French wars had ceased, and the pretensions of the nobles had wasted away in the bloodshed of the wars of the Roses, the court, as a magisterial department, became extinct; for the spirit of the parliamentary and county constitution was antagonistic to its continuance. After the period of the wars of the Roses such writs were no longer issued,

2. The maintenance of the King's peace in the royal residence and its precincts was reserved, as well as the jurisdiction over the servants of his household. There existed for this purpose a court held before the Steward of the Household, and the Marshal as household officer, which within its sphere of action excluded all other courts. The principle of the jury was applied to it: in civil actions arising between courtiers the jury is only constituted of courtiers; in other cases a common jury is empanelled (3 Edw. III. c. 2). An appeal lies to the "King in his palace," which is delegated to the King's Bench. (2)

3. Lastly, the special administration of justice in forest cases was also reserved. The concessions made by the *Charta de Foresta* merely extend to the less rigorous exercise of the ancient rights of the King, without introducing the restrictions of Magna Charta. There remained accordingly in this province a purely administrative justice without a jury. Once every forty days the lower foresters assemble and form a forest court (court of attachment or woodmote) to lay informations as to offences against the forest and hunting laws, which were noted by the verderer. Thrice a year the verderers hold a forest court (court of swanimote) upon these informations and for the decision of disputed rights of pasture. The upper court of the forest for more serious cases is formed by two itinerant justices, the one travelling the whole of the north, and the other the whole country south of the Trent (*court of justice seat* or *court of the chief justice in eyre*). (3)

and the former court of law thus sinks down into a herald's office. Moreover, after Henry VIII., the hereditary office of high constable was not again filled (Coke, Inst., iv. p. 124).

(2) The Court of the Steward of the Household was competent in disputes between the servants of the royal household and in trespasses within the precincts of the palace, even when only one of the parties is a royal servant; and in cases of debt and contract where both parties belonged to the royal household. The precincts of the palace extended to a twelve-mile radius from the royal residence. This jurisdiction was never subordinated to the King's Bench until in Edward III.'s reign a writ of error before the King "in his palace" was introduced (Thoms' "Book of the Court," pp. 302, 303).

(3) For the administration of justice in forest cases there existed until Richard I. a *summus justiciarius omnium forestarum*, and then a commission of four *justiciarii* with under-officials. The *Charta de Foresta* provides for an exceedingly numerous staff of forest officials. In every great forest there

Besides these older special courts a new administration of justice proceeded from the newer administrative system of the permanent council: the equity jurisdiction of the Lord Chancellor, the Courts of Admiralty, and the penal jurisdiction of the Star Chamber, to which I shall refer in the next chapter.

are to be four verderers as supervising administrative officials and forest justices. Under them are twelve inspectors of forests (regarders) for surveys, investigation of contraventions of the forest laws, clearances, etc. Under them the foresters with the duty of preserving both wood and game, giving information against and prosecuting transgressors. Besides these there are rangers (gamekeepers), agistors (inspectors of pastures), woodwards (keepers of woods), stewards and beadles as court attendants and executive officials. As head of the department there is a Chief Warden of the Forests. This administrative sphere was regarded in the Middle Ages as freed from the restrictions of the common law, and was entirely left to the royal ordinance. In the *Charta de Foresta* of Henry III. the heavy burden of the general suit of court at the sittings of the courts of the forest was abated. Some mitigation of the bloody punishments that were threatened was obtained under Henry III. through the Assize of Woodstock, 1184 (limitation of capital punishment to the third offence, etc.). The popular complaints as to arbitrary afforestations continued for a long time, though the antagonism of the magnates was in later times somewhat lessened by the fact that they were allowed to participate to a limited extent in the privileges of the forest right.

CHAPTER XXIII.

The Permanent or Continual Council—The Court of Chancery.

The corporate constitution of the central tribunals appears as the stronghold of the modern judicial system, that pillar of the rising constitution, which as it gradually rose was strengthened by the consolidation of the county and municipal unions into fixed corporations. Beyond doubt there existed an intimate connection between both these formations and the fundamental laws of Magna Charta. The one is called forth and rendered effectual by the other; the one is a natural deduction from the other. These permanent elements of the political system, however, form only a firm encircling bond, within which the great sphere of the ordinary business of the State is reserved for the decision of the King. There is now formed from among the counsellors for this round of business a Continual or Permanent Council, which first took the form of a governing body, when under Henry III. a regency became necessary for the first time. After Henry III. had substituted for it a personal government with foreign favourites and subordinate clerks, the barons and the prelates demanded in opposition thereto that the great offices of State should be filled by "suitable" persons, and after a bitter struggle took the matters into their own hands. But though at that time the issue was in a violent party government, Edward I. from the standpoint of the monarchy recognized the demand as righteous, and carried it into effect. It is as a spontaneous creation of the monarchy

that we now find, in addition to the Exchequer and the central courts of law, a continual or permanent council for the efficient despatch of State business, which discharged in joint deliberation the highest affairs of the State, and thus became the centre of the parliamentary system that was now beginning.*

I. **The functions of the Permanent Council** may be compared with those of the cabinet council of our day. But we must not leave out of sight the comparative simplicity of the times, the separation of Church and State, and the hitherto personal character of the rule of the Norman kings. The following heads may be in some measure distinguished from one another :—

1. Advising the King upon the issue of ordinances in the general province of Government.

2. Resolutions as to war and peace, treaties with foreign powers, summons of the feudal and county militia, measures for the organizations of paid armies, and for their general direction.

3. Resolutions touching measures in case of national distress and tumult ; appointment of extraordinary commissions, and instructions for such cases.

4. Advising the King where the *jurisdictio extraordinaria* was to be exercised, which was reserved to the King for the most important cases.

5. Resolutions upon petitions of private persons, corpora-

* The formation of the permanent council has received a new elucidation by the reprint of the protocols of the council in the work "Proceedings and Ordinances of the Privy Council of England, from 10 Richard II. to 33 Henry VIII.," by Sir H. Nicolas (7 vols. 8vo, 1834–1837); upon this was founded the monograph of Sir Francis Palgrave, "An Essay upon the Authority of the King's Council" (1 vol. 8vo, 1834), which for the first time attempted to give a consecutive picture of this political body and its relation to the Parliaments of the Middle Ages, but sometimes went too far in the conclusions drawn. Hallam has turned these modern sources to account (against Palgrave, *vide* "Middle Ages," c. viii. 3 note). Among the older literature, the work of M. Hale, "Jurisdiction of the Lords' House of Parliament" (1796, 4to), is still valuable. The recent treatise of Dicey, "Privy Council" (Oxford Essays), is now out of print. The novelty of the formation of the Council can be perceived in Edward I.'s reign in the still unsettled designation, "*Continual Conseil*" (Nicolas, i. 3), "*Secretum Concilium*" (Heming, b. ii.), "*Familiare Concilium*" (M. Paris).

tions, and counties, touching complaints of financial oppression, abuse of offices of trust, deficient legal protection, and applications for and grants of pardon. These form the ordinary current business of the council. In consequence of the malpractices of the *Vicecomites* and local bailiffs, of the necessity which had arisen for the remodelling of many institutions that had suffered under the throes of former constitutional struggles and under the haughtiness of quarrelsome magnates, such was necessarily its ordinary sphere of activity; especially now that the Commoners in the national assemblies were soon to become the mouthpiece for national grievances. Throughout the whole of the Middle Ages, the Parliaments are regarded as assemblies "for the redress of wrongs and remedy of abuses." With each Parliament petitions flowed in, claiming every sort of relief, not merely in public matters, but frequently also in petty private affairs, from all classes of persons, and on all kinds of subjects. The "poverty of the petitioner," the power and the number of his opponents, and the inadequacy of the common law, form the ordinary motives for appeal to the council. Herein can be perceived the fundamental idea that "the King in council is there as the final resource for every grievance, which the ordinary tribunals are powerless to redress." (1)

(1) The sphere of action of the council may be best compared to a modern cabinet council, in which the whole of the business of the central government is comprised, so far as it has not been assigned to the courts for decision according to constitutional principles, or to the Church to deal with according to its independent rule. See the description which Sir H. Nicolas, vol. i. p. 1, gives of it. Its sphere of action is the same as that which the Norman kings informally filled by confidential persons and counsellors, whom they frequently changed. The progress of the age is seen in the corporate nature of this national body. Palgrave ("Privy Council," p. 34) rightly assumes that the council was looked upon as a properly constituted "court" for the Crown vassals. As a matter of fact the clause of Magna Charta touching the *amerciaments* of the Crown vassals *per pares suos* was regarded as complied with, when the council fixed the fine. Towards the Exchequer, too, the competence of the council was not legally defined: at times important financial business was reserved to it. Under the regency of Henry VI., feudal wardships, consents to marriages, leases, etc., were reserved by the council to the Lords, including questions concerning lunatics, who were occasionally brought before the council that inquiry might be made as to their state of mind. In other cases it was merely accidental that sittings of the council were held under the roof of the Exchequer.

For the discharge of this mass of business it was enacted (5 Edw. I.) that all petitions should in the first instance be examined into by the judicial officers to whose department they belonged; and that only matters of importance should be laid before the King and his council. In 21 Edward I. the King appoints "receivers of petitions," which were ordered to be assorted into five classes; (1) for the Chancellor, (2) for the Exchequer, (3) for the Judges, (4) for the King and Council, (5) such as have already been disposed of. In this manner they were to be "reported" to the King. The appointment of receivers for this purpose soon became an established institution, which is described in Fleta's law book as a "*Curia coram auditoribus specialiter a latere Regis destinatis*," "they who have not to decide, but only to make a report of what they have heard, in order that the King may determine what shall be done touching the parties." Under Richard II., when the council had already entered into more intimate relations with the *magnum consilium* of the peers, the petitions are divided into three classes; (1) bills of grace and offices, which must be answered by the sovereign in person; (2) bills of council, which the council may dispose of; (3) bills of Parliament, which may not be answered without consent of the Parliament.

The resolution on the report of the receiver could be made in one of three ways:—

(i.) Immediate decision, generally written on the upper margin of the petition by a member of the council: under Henry V. and VI. generally by the chamberlain.

(ii.) Appointment of a special commissioner to redress any extraordinary injury to the petitioner requiring a speedy remedy. This is a *delegatus a latere* to whom a commission of *oyer* and *terminer* was issued in the Chancery upon writ, or by a mere writing.

(iii.) Reference of the matter to the Exchequer, or other court, especially to the Chancery. From Edward I.'s time the answer "*sequatur in cancellariam*" was a frequent one, and given generally under the privy seal.

The rules of procedure of the council were themselves a subject of the royal right of ordinance, but under the house of Lancaster, for the sake of greater solemnity, were frequently issued from Parliament. For example, the regulations of the council of 1406 were issued in Parliament, and registered as an Act. Those of 1424 were annexed to the Act of Appointment. Those of 1430 were drawn up in the council, assented to by the lords, read in the presence of the three estates, and then signed by the council (Stubbs, iii. 251). (1[a])

(1[a]) As to the oldest methods of procedure, especially the arrangement of petitions into groups, cf. Palgrave, pp. 23, 79. As to the form of the resolutions, we find that—

(i.) The immediate personal decision was comparatively rare, and even in the case of these marginal rescripts it is frequently mentioned that they were issued "on report being made in the council." Henry V. often signed his decrees with his own hand; numerous royal orders occur also without signature (Nicolas, vol. vi. p. 214).

(ii.) The appointment of a special commissioner by a commission of *oyer* and *terminer* was a continuation of the older personal administration of justice, and led to collisions with the ordinary jurisdiction of the central courts, against which the Parliaments began quite early to remonstrate. The stat. Westminster 2 (13 Edw. I.) already gives the assurance, that no writ of trespass *ad audiendum et terminandum* should be issued in any other manner than before the justices of one or the other bench, or before the other justices, except it be a heinous trespass which demanded speedy redress. All such assurances (*vide* note 3[a]) were, however, so equivocally and uncertainly framed, that they yet left room for the *gouvernement personel*.

(iii.) The reference of the matter to the Chancery (cf. Hardy, "Introduction to Close Rolls," p. 28) led to the Lord Chancellor's office becoming a separate court of law.

The later rules of procedure under Henry VI. are known in detail and instructive. The rules for the administration of the council (2 Hen. VI.) contain among others the following: The council shall not interfere in matters which are to be decided according to common law, except where one party is too powerful to enter the lists with the other, or for other urgent reasons; The clerk of the council shall select the bill of the poorest plaintiff, which shall be first read and answered; One of the King's serjeants shall be sworn, to lend his best assistance to the plaintiff, without fee, under pain of dismissal (Nicolas, vol. iii. pp. 149–152). A similar spirit is recognizable in the regulations of 8 Henry VI.; the council was to interfere "if their lordships found too much power on one side and too little on the other." The council had to hear, to deal with, to communicate, to appoint with reference to, and to decide upon, matters laid before it. Charters of pardon, grants of parsonages and offices, and other matters of grace and favour, belong to the King personally. On topics of great moment and importance, it shall deliberate, but not pass final judgment without the King's advice. Where the number of votes in the council is equal, the matter must be laid before the King, and the decision left to him alone (Nicolas, vol. v. p. 23). In 8 Henry VI. c. 1, there follow certain orders for regulating the use of the signet, privy, and great seal, saving the prerogative (Nicolas, vol. vi. p. 185). In the Cottonian manuscripts, there are original decrees of the council (probably dating from 22 Henry VI.), which provide (*inter alia*) that "considering all such matters as pass through many hands are less likely to be decided to the prejudice of the King or of any other person, it has been found well that all bills to

II. **The personal constitution of the council** corresponds to this sphere of business. It consists of the persons whose assistance the King requires for determining matters of the highest instance; to use a modern expression, the heads of the departments of State, with a number of persons, whom he has thought fit to summon to a continual deliberation on such matters. Foremost among the officials is:—

(*a*) *The Lord Chancellor*, and in addition to him the chief clerk of his office, the Master of the Rolls, as well as some higher clerks (reporting counsel), being the persons who at this period represent the most varied legal and official knowledge.

(*b*) *The principal members of the central courts, i.e.* the chief justices and the other justices.

(*c*) The directing members of the Exchequer, the *Treasurer* and *Chancellor of the Exchequer*.

(*d*) The principal officers of the royal household, before all the *King's Chamberlain*, who continued for centuries a chief member of the council. Next to him the *steward of the household*, and after the administration of the royal court had become further subdivided, the *treasurer of the household*, the *controller*, and the *maître de garderobe*.

(*e*) *The Keeper of the Privy Seal.* Now that the Chancellor had become a chief officer of the realm, the King was again in need of a cleric in the confidential position of a personal cabinet secretary. Under Edward III. such a one appears as a minister of State, with a formal oath of office (14 Edw. III. c. 5), under the name of Keeper of the Privy Seal; later known as Lord Privy Seal.

(*f*) *The Archbishop of Canterbury* as Primate appeared, conformably to the position of the Church, to be so essential a member, that in 10 Richard II. he submits a solemn protest, wherein he claims for himself and his successors in

which the King assents shall be delivered to his secretary, in order that he may draw up letters under the royal signet to the Keeper of the Privy Seal, and thence from the Keeper of the Privy Seal to the Chancellor." Where petitions concern matters of justice, the King's decree is taken in order to send them to the council, which then assigns them to the proper court, except when the petitioners are unable to prosecute according to common law (Nicolas, vol. vi. p. 29).

office the right of assisting at all the sittings of the royal council, be they general, special, or secret (Rot. Parl., iii. 223).

These are plainly the chief elements of the council. But yet a clear distinction between them was wanting in the time of Edward I., II., and III. As occasion required, lower officials were also summoned to attend the council, to give opinions and information, and to receive orders; such as King's serjeants, Chancery clerks, escheators, itinerant justices, and others. A definition of the ordinary members began to be made when the rival power of the parliaments first took cognisance of the constitution of the council. When differences of this sort first arose, the following were designated as members *virtute officii*: the Chancellor, the Treasurer, Privy Seal, Chamberlain, and Steward (Rot. Parl., iii. 73). These five were regarded as the chief members and managers of the current business. Moreover, during the whole of the Middle Ages there was no president of the council other than the King himself, to whom it is naturally open to honour a member with the temporary conduct of the business. For instance, in the latter part of Edward the Third's reign, the Bishop of Winchester was mentioned as "*Capitalis Secreti Consilii ac Gubernator Magni Consilii.*" In cases of personal impediment, the regent of the realm was for this reason the natural president of the council, as in 1 Henry VI., the Duke of Bedford, and later the Duke of York.

The somewhat fluctuating form of the council became modified from the time when, under Richard II. and under the house of Lancaster, the estates of the realm began to take a more decided share in the Government. In these later times there appear seldom fewer than ten and generally a greater number of spiritual and temporal lords as members of the council; with them sit the highest officers of State, now as ordinary members, and no longer mingled with the under-officials who were occasionally summoned. The growing power of Parliament particularly aimed at subjecting the Lord Chancellor and Keeper of the Privy Seal, as the two bearers of the decisive national seal, to a definite responsibility. In

all material points this was attained under the house of Lancaster. In the eighth year of Henry IV. the King in Parliament agrees that, for the maintenance of the laws of the land, the Chancellor and the Keeper of the Privy Seal shall not allow any warrant, grant by patent, judgment, or other matter, to pass under the seal in their possession which should not so pass according to law and right, and that they shall not unduly delay those that must pass. Attempts to prosecute the Keeper of the Privy Seal were made as early as Richard II. Under Richard II. and Henry IV. the members were appointed annually, but their appointments regularly renewed, unless accusations of bad behaviour or petitions to be discharged from serving intervened. Their annual pay was graduated according to their rank, as were also the fines for neglecting to appear at the sittings. In a process of political crystallization, the purely personal *conseil du Roi* of the Norman kings had now become a department of State. (2) But as the body was too large and too heterogeneous in its consti-

(2) The personal constitution of the council has been ascertained by Nicolas from the protocols of the great council with more exactness than in former times. The Lord Chancellor is everywhere conspicuous as the principal personage for the formal procedure, though he is not president of the council, and by no means always the most influential person in it. The importance of the office of the King's Chamberlain is new: he is indebted to the influence of the magnates in the council of the realm for his improved position. In 15 Edward III. he expressly swore to obey the laws of the realm and the Great Charter. In 1 Richard II. he became a member of the regency. His functions are to endorse petitions, to formulate royal immediate decrees, and communicate with Parliament. In 11 Richard II. and frequently later he was impeached by the estates. The position of the Keeper of the Privy Seal, as he was first called in 13 Edward III. c. 5, is also new; later he appears as Clerk of the Privy Seal (2 Richard II.); as Guardian de Privy Seal (Parliament Rolls of Henry IV.); as Lord Privy Seal (34 Henry VIII.). This, however, did not exclude laymen and ecclesiastics from being also employed as secretaries of the King, and on confidential special commissions, in which sense "King's clerks" occasionally occur under John and Henry III. As to the older constitution of the council, cf. Palgrave, p. 20, *seq.*; Nicolas, vol. i. p. 3. The statements of the latter relating to the period of Henry VI. have been made very carefully. The royal council consisted in 2 Henry VI. of twenty-three persons: the Duke of Gloucester, the Archbishop of Canterbury, four bishops, the Chancellor, the Treasurer, the Keeper of the Privy Seal, the Duke of Exeter, five earls, four *sires*, and two *messieurs*, Thomas Chaucer and William Alyngton (Nicolas, vol. iii. p. 148). The salaries, fixed according to rank and length of service were: for the Archbishop of Canterbury and the Bishop of Winchester at 300 marks; for a bishop, earl, and the lord treasurer 200 marks; for a baron and banneret £100; for an esquire £40 (Nicolas, vol. iii. 155).

tution or varied business, delegations and commissions were issued, some of which form the nucleus of independent departments.

III. **The commissions and delegations of the council** were chiefly necessitated by the fact that more specially legal and technical questions came before the council, in the case of which it seemed proper to form a narrower committee for their treatment and decision, or rather for passing an opinion which was to influence the ultimate decision of the King. The personage most suited, by reason of his position and his under-officials, for the discharge of these more intimate functions was the Chancellor. Hence the sub-commission was most frequently composed of the Chancellor and the justiciaries of the two central courts, and hence are issued "*decreta per curiam cancellariæ et omnes justiciarios*," or "*decreta cancellarii ex assensu omnium justiciariorum et aliorum de Regis consilio.*" In the first century of this period even formal proceedings are somewhat frequently taken before the Chancellor and the judges in Westminster Hall. Commissions of this description take the place of the extraordinary judicial commissions of prelates and barons which, in the former period, the Norman kings were wont to appoint for the Crown cases reserved.

As a permanent institution there next arose a kind of committee for appeals from the Exchequer. As this did not remain subordinate to, but was co-ordinate with the central courts, an appeal could only lie to the King; that is, to the "King in council." It was a matter of delicate questions of financial law, which were well suited for a special council of men well versed in matters of business. Hence a commission was at first formed of the Chancellor, Treasurer, and two justices; but it was subsequently laid down in 31 Edward III. stat. 1, c. 12, that the Chancellor and Treasurer should meet together and have the documents laid before them, summon the justices and other experts according to their best judgment, demand reports of the barons of the Exchequer, alter the Exchequer decree according to their opinion, and remit it to the Exchequer for further consideration.

Still more important was the creation of a separate *Court of Equity*, which proceeded from this system of delegations. Certain petitions and questions touching property were, from their peculiar nature, not so well adapted for hearing before the justices of the realm as before the Chancellor, who might still be looked upon as the prime authority and chief representative of a more universal juristic education. In course of time deficiencies and hardships were conspicuous in civil justice, which could not be redressed in the ordinary course of justice, either because they were ill-suited for a jury, or because they could not be decided according to the fundamental principles of the common law (such as fraud, accident, trust, that is, *actio* and *exceptio doli*). Hence there sprung up a "remedial jurisdiction," *supplendi et corrigendi juris civilis causa*, analogous to the prætorian jurisdiction, in which the Chancellor proceeding according to *æquitas* (that is, principally according to the principles of the Roman and canon law), directs his reporting secretaries or Masters, and then decides *per decretum*. The most frequent cases of this equitable jurisdiction from Richard II. to 37 Henry VI., were cases of conveyances to uses *inter vivos;* but even in those early times the sphere of action was probably a wider one, and from the very nature of the jurisdiction, the office of Chancellor continued until the close of the Middle Ages to be filled by ecclesiastics. (3)

(3) The delegations of the council and the equitable jurisdiction of the Lord Chancellor have one and the same origin. The establishment of sub-commissions of the Council was primarily an administrative measure, and not a constitutional institution. It was only after the lapse of time that such creations, owing to continually arising needs of the same kind, adopted the character of magisterial departments. It is only juristical pedantry which would at once make of these *ex tempore* commissions formal departments of State. Upon the authority of Hale a so-called "*concilium ordinarium*" or "*concilium legale*," was said to have existed, being composed of the Privy Council, certain great officers, judges, and others. But neither the expression "*concilium ordinarium*" nor "*legale*" occurs in the official records; nor do we find any regulation as to its members or procedure. We can, accordingly, no more make a magisterial department of this institution than of the shifting judicial commissions of the Norman period. Under Edward III., for example, proceedings were frequently assigned to the "Chancellor, Treasurer, and others of the King's council" (Reeves, iii. 386). In 44 Edward III. a difficult case was heard before "the Chancellor and all the justices of the King's Bench and Common Pleas" (Foss, iii. 337). Even in

It is quite conceivable that these functions occasioned conflicts with the Parliaments, which are chiefly aimed at the civil jurisdiction of the Chancellor, but partly also at the penal jurisdiction exercised by the King in council, the abolition and clear definition of which were equally impracticable. In 25 Edward III. the Commons protest against any one being brought before the council on account of his freehold, or on account of such suits as affect life and limb, and against any one being fined by informations laid before the council or one of the ministers, unless such legal procedure shall have been "formerly customary." In the answer to this the extraordinary criminal procedure was expressly reserved; "*mes de chose que touche vie ou membre, contempt ou excesses,*" it shall remain as formerly customary (Palgrave, Council, 35). It was apparently agreed that the assignment of ordinary actions to the courts was to be understood "*salvo jure regis,*" that is, with reservation of extraordinary *causæ majores* to the King; but the Parliaments wished to co-operate in this. In 27 Edward III. the Commons themselves expressly consent

earlier times, under Edward II., Westminster Hall was named as the place at which the Chancellor holds his sittings; this place was called "*Magnum Banc*um" (Foss, iii. 177), and the sittings were described as being "*in plena cancellaria*" (Rot., cl. 25, Edward III.). The Admiralty Court was an instance of such delegations of the council, which was an outcome of a special commission of the King, with a jurisdiction in the ports, and over offences committed on the high seas; perhaps existing as early as Edward I., with powers more limited in later times on motions of the estates under Richard II. Another delegation is formed by the Court of Requests under the Lord Privy Seal (Spence, "Equitable Jurisdiction," i. 351). The practical need for a remedy for the clumsiness of the common law, led to the later jurisdiction over "equitable obligations," the fulfilment of which was left by the common law to the conscience, whilst the common wants of life and the existing views of law necessitated a magisterial compulsion for their fulfilment (Reeves, iii. 188). From the time of 2 Edward III. the assignment of the matter with this view under the formula "*sequatur in cancellariam*" becomes more and more frequent, and soon also with the further addition "*fiat ulterius justicia in cancellaria; non potest juvari per communem legem, veniat in cancellaria et ostendat jus suum; fiat ei justicia secundum legem cancellariæ*" (Foss, iii. 178; Hardy, "Introduction to Close Rolls," p. 126). From the time of Richard II., or at all events under the house of Lancaster, the jurisdiction over Uses stands prominently forth as the principal object (Reeves, iii. 381). But beyond doubt the special jurisdiction of the Chancellor was also a delegation of the King's council (Palgrave, Privy Council, 25; Spence, "Equitable Jurisdiction," i. 709–716; Hallam, "Middle Ages," note x.). England had thus attained to the necessary completion of its system of private law, which was accomplished in Germany by the reception of foreign law.

to an extraordinary criminal procedure against clerics who appeal to the papal chair; in the statute even imprisonment for an indefinite time, "during the King's pleasure," is threatened, as well as forfeiture of lands and personal property, of those who should refuse to answer for such a contempt before the King, or his council, or his chancery, or before his justices (Palgrave, 39). In 42 Edward III. c. 3, upon a complaint raised by the Commons, it was indeed promised in general that none should be required to answer before the courts except by regular judicial procedure. But the extraordinary power of the council remained unaffected by this, and in turbulent times, such as followed under Richard II., it was exercised with a wide scope by the council and the chancery, for the maintenance of peace. But in civil procedure the Chancellor's writ of subpœna gave rise to a new petition (13 Richard II.) "that neither the Chancellor nor the council after the close of Parliament should issue any ordinance against the common law, and the old customs of the country, and against the statutes that had been passed or that were to be passed in that Parliament, but that the common law should take its course without respect of persons, and that no judgment once delivered should be annulled but by due course of law" (Palgrave, 45). The answer ran with the usual ambiguity, to the effect that the former customary procedure should remain in force, "so that the King's royal right be assured," and if any one felt aggrieved "*qu'il monstre en especial, et droit lui soit fait*" (Palgrave, 70). Protest was not raised against the extraordinary judicial power of the King in general, but only against such proceedings on the part of the council, without sanction of Parliament. In the stat. 17 Richard II., protest was only made against citations before the King's council and the chancery based upon false information (Reeves, iii. 194). In 1 Henry VI. the Commons complain of the citations before the council and the chancery, in matters "in which a legal remedy is afforded by the common law;" in like manner a writ of subpœna was not to be issued until the justices of one or the

other bench had first tried and attested the fact, that the plaintiff had in this case no remedy at common law (Palgrave, 50, 51). In 8 Henry VI. jurisdiction was reserved to the council in quite indefinite terms "so often as their lordships should find too great power on the one side, and on the other too great weakness," or if they should otherwise find "some reasonable cause" (Palgrave, 81). Finally, in the stat. 31 Henry VI. c. 2, the offences were specially mentioned by name for which the council was wont to summon offenders before it, and the procedure defined that was therein observed, especially the more rigorous courses, by which disobedience to ordinances under the privy seal or under a writ of subpœna were to be prosecuted as *contemptus regis* (Palgrave, 84, 86). This extraordinary penal jurisdiction was in later times exercised in the Court of the Star Chamber, and was, therefore, frequently designated by this name. (3[a])

IV. The position of the **Lord Chancellor as head of the Chancery department** forms in a certain sense the keystone of the constitution of the council. As the great office of the Chancellor had remained the common bond of the central courts, it also serves as *clavis regni* for other business of the King's council. All solemn decrees of the King in council here received their authoritative character. The *Protonotarius* of the Chancellor managed the preparation, despatch, and registration of the State treaties in the treaty rolls. The rest of the State business was recorded in the charter, patent,

(3[a]) The opposition of Parliament to the jurisdiction of the King in council begins from the time when Parliament had become consolidated into a united body (Hallam, note xi.; Spence, "Equitable Jurisdiction," i. 343–351). In a decision which afterwards became famous, the "Chamber Case" (Croke's "Report," vol. v. c. i. p. 168), the judges acknowledged "that the court of Star Chamber had existed long before the proclaiming statute 3 Henry VII., as a very high and honourable court." The above evidence shows how far this assumption was well founded. There here remained a field of action for the administrative powers, in spite of the advance of definite legal arrangement in the political rights of the realm. The practice of the chancery succeeded better in defining for itself more exactly the different branches of its civil jurisdiction, as to which Spence ("Equitable Jurisdiction of the Court of Chancery," vol. i. 334 *seq.*, 420 *seq.*, 435–683, 692–716) affords us the most comprehensive survey. A controversy as to the respective advantages of "Bench" and "Office" had already begun within these narrow limits during the Middle Ages.

close, and fine rolls. The most numerous administrative documents belong to the province of the *Rotuli literarum clausarum*, "Close Rolls," so called because they were issued with the seal under cover, in contradistinction to the *litteræ patentes*, which were addressed to all faithful subjects. Here, as elsewhere, centralization and the transaction of business by means of writing mutually influence each other. In the preceding period royal orders were still sometimes given by word of mouth in the Exchequer, even in judicial matters. Now writing became the unconditional rule, and the importance of the great seal at the same time increased. Apart from charters, which are publicly issued in Parliament, and in which the mere "sign manual" was for a long time retained, the use of the great seal is regarded as essential for all writs; in it the development of the English State from the *gouvernement personnel* is symbolized. From the time of Henry III. it is really the *clavis regni*, the faithful companion of the King, even in a foreign land. As the history of the great seal is thus identical with that of the most important State documents, Sir H. Nicolas began to write its biography (Nicolas, vol. vi. p. 148, *seq.*). The order to use the great seal can be given, either by word of mouth, or in writing; but a document only becomes a solemn State Act when the great seal has been actually affixed. In cases of the King's absence, a duplicate of the great seal was given to the Chancellor for writs *de cursu* which were issued by him upon his own responsibility, but this duplicate was always given back after the occasion for its use had ceased. For non-official correspondence the privy seal was at first used, and when this also had attained a political meaning, the signet. As early as 28 Edward I. c. 2, the assurance was given that no common law writ should be issued under the privy seal. The struggle against the privy seal which commences from that time marks the struggle of the estates against the *gouvernement personal.* (4)

(4) The Lord Chancellor as head of the chancery attains greater importance with the development of the use of the seal (Nicolas, "Proceedings,"

The staff that was necessary for the discharge of this multifarious judicial and chancery business, consisting of a chief as well as of a number of reporting counsellors or "Masters in Chancery," and clerks, received its form in this period. Among the numerous staff of clerks the chief of the office now stands out conspicuously as the *Custos Rotulorum Cancellariæ Domini Regis.* He was first described by this name in the Patent Roll, 14 Edward I. Under Edward II. this Master of the Rolls was specially appointed by the King, took a special oath of office, and was inducted into his office with great pomp (Foss, iii. 327). The appointment was very generally made for life, or "*quamdiu bene et fideliter se gesserit in officio*" yet sometimes otherwise "*quamdiu nobis placuerit*" (Foss, iv. 4). From this time he was regarded as Vice-chancellor, and was ranked in the stat. Richard II. c. 2 in precedence to the justices of the central courts. (5)

vol. vi. p. 148). The most important *Rotuli* which have been partly published by the Record Commission are the following:—

(*a*) *The Charter Rolls*, containing the royal grants to cities, boroughs, and corporations, rights of market, and the like. The collection begins with 1 John, and runs to 7 Henry VIII., after which date such grants were made in the form of patents. See Rotuli Chartarum, 1199–1206 (ed. Hardy, 1837, *et seq.*).

(*b*) *The Patent Rolls*, containing the grants of offices, lands, titles, and the like, which were issued in open documents with the great seal affixed. They begin with 3 John. See Hardy, "Description of Patent Rolls in the Tower of London," 1835.

(*c*) *The Close Rolls*, containing royal mandates, letters, and writs, principally rescripts addressed to private persons on private matters, closed on the outside with the seal. They begin with 6 John. See *Rotuli litterarum clausarum*, 1204–1227 (Hardy, vols. i. ii.).

(*d*) *The Fine Rolls*, containing the grants of the Crown fiefs, with the dues for alienation, *relevia*, consent to marriage, etc. See Hardy, "Rotuli Finium," and above, p. 171.

With few exceptions the great seal cannot be used without the express order of the King, either (1) verbally, or (2) by writing under his signet, or (3) by writing under the privy seal addressed to the Chancellor, or (4) by writing under the signet addressed to the keeper of the privy seal, who thereupon communicates the royal pleasure to the Chancellor by a warrant under the privy seal. The origin of written instruments sealed with the great seal is given in Palgrave ("Commonwealth," vol. i. p. 147; Privy Council, 13); for the continuous history of the great seal under the separate reigns, cf. Foss ("Judges," Index, *vide* Seal). A juristic survey of the royal writs according to the difference in their legal nature is given in Coke, Inst., ii. 40.

(5) The staff of the chancery now takes a firmly organized form with the growing importance of the office in the administration of the realm. The list of the chancellors of this period is given by Foss (Judges, vol. iii.). As early as Edward II. the title "*Cancellarius Angliæ*" occurs twice; and the honorary title "Lord Chancellor" from this time comes into gradual use. As a rule the chancellors are still chosen from the higher clergy; under Edward

III. among seventeen chancellors were four archbishops and eight bishops, but on the other hand also one knight and four professional jurists. An attempt of Parliament to thrust out the clergy from this position, failed, and the lay chancellors were always after a very short time replaced by prelates (Foss, iii. 320). The higher chancery clerks now received the title of "*Magistri*" or *Masters in Chancery* (Spence, vol. i. 359 *seq.*), for as these clerks without exception belonged to the lower clergy, the custom arose of applying their title of rank as *Magistri* to their office. Towards the close of Edward III.'s reign, we find the title of "Masters" used in the documents containing their appointment (Foss, iii. 334). In the company of the Chancellor they are also active in Parliament, in which they usually officiate as *receivers of the petitions*, whilst the class of "triers" was formed of the prelates, barons, and justices. More numerous still was of course the staff of the *clerici de secundo gradu*, as they are now termed, in contradistinction to the *Magistri* or *clerici de primo gradu*. As head of the department for the registration of the State treaties stood the *Protonotarius*, whose treaty rolls from Edward I. to 22 James I. are still in existence. The whole of the clerks inhabited an inn near the royal palace, and received their salary and supply of provisions from the royal household.

CHAPTER XXIV.

The Parliament of the Prelates and Barons.

From the time of Edward I. there were connected with the permanent council, as the seat of the central government, certain periodical meetings of notable prelates and barons, who became united with the King's council, into a "great council;" and then separated themselves as an Upper House from what was afterwards the "House of Commons." Edward I. on ascending the throne found a condition of things existing in which prelates and Crown vassals had already for a generation past exercised their right to impose scutages and aids, and had been summoned to deliberate upon important resolutions of the realm. Convinced that such participation in the central government was henceforth unavoidable, he made this concession without any reserve, and in the course of his reign extended it beyond the original design. The functions and constitution of these parliamentary assemblies assume a form from which at length proceeds an hereditary peerage of secular lords.

I. The *concilium* of the prelates and barons formed, from Edward the First's time, a constitutional link in the administration of the realm, and as a periodical council, was ordinarily convoked four times a year, so that the magnates met together with the royal permanent council, and during the period of meeting formed a "great council," in which those who were summoned in virtue of office, ecclesiastical dignity, and property, took their places side by side. We have here to

do, not with a mere estate of the realm, in which a privileged class of landowners claim a right to be heard, but with a constant and regular participation of the magnates in a political system with fully developed military, judicial, police, and financial powers. The competence of the *Magnum Concilium* is bound up with these prerogative rights. The unlimited royal powers are now exercised under the constitutional co-operation of the magnates; the portion of the government which remains indefinite and informal is the residue of personal rule. Reserving its indefinite authority, the principal functions of the great council which still survive in the Upper House as it exists at the present day, may be already separated off into a quadruple sphere of action: a court of law, a tax-granting body, a State council for the administration of the realm, and a legislative body.

1. Under Edward I. its position as a court of law is prominent. The parliament in this reign, is pre-eminently intended to be a judicial assembly, to which the other functions are annexed. In this sense (which was also that intended by the barons in the Provisions of Oxford) Edward I. convokes four times in each year a *parliamentum*, and he only departed from this rule afterwards in very turbulent times. In this sense in later reigns the motion was repeatedly put and agreed to, that at least once in each year a parliament, that is a judicial assembly of the magnates, shall be holden. Its models, the *Echiquier* of Normandy, and the Parliaments in France, and the Germanic fundamental idea by which the secular government wears the character of a court of law, were all of some influence upon its creation. The competence of this court is bound up with the King's right of taking the most important and difficult cases to his court. The current law suits were certainly now, indeed, assigned to the corporate central courts, as they had formerly been to the county courts. But this delegation did not annul the royal right of personally directing the court in extraordinary cases (above, p. 406), as was the case in the German Imperial Constitution, where a court of officials sat in addition to the

imperial court, and a parliamentary revision of the body of official judges was reserved. It has never been constitutionally determined which *placita* belonged to the jurisdiction of Parliament, for the King never renounced his power of reserving the most important and extraordinary cases to his personal appointment of a *judicium parium;* and the estates themselves were interested in upholding these powers, from the time when their right of co-operation had been constitutionally established. Hence civil and criminal cases might in the first instance, as well as in the higher instance, be brought before Parliament, if the matter appeared of sufficient importance. As extraordinary cases of the highest importance, the following presented themselves :—

(*a*) Complaints against erroneous decisions of the central courts, which were admitted by a royal writ of error, and now came before the King in council, for which the *Magnum Concilium* offered itself as the higher, more powerful, and more illustrious body. In the year books 29 Edward III. 14 (Hale, Jurisd., 41), the justices plainly declare it to be the prevailing opinion that the Permanent Council is not the place to upset the decisions of the central courts. The assistance of the great council in this matter proceeded tacitly from the necessity which had arisen for a higher authority. (1)

(1) The parliament is now the *judicium parium* of the estates, an institution which the magnates had long endeavoured to establish. The expression "parliament" was at the close of this period pre-eminently used in this sense (Parry, "Parliaments," xi.; Peers' Report, vol. i. 169–171). In accordance with Fleta's text-book, the Parliament was under Edward II. described as a constitutional tribunal, "*coram Rege et Concilio suo in præsentia Domini Regis, Procerum et Magnatum regni, in Parliamento suo.*" A change had been made in the selection only; whilst in former times the royal judicial commissions were based upon personal selection out of many, it was now the class of the magnates that had become formed into a body, which the King in his character of chief magistrate consulted. What once, in the action against Thomas Becket, appeared as an extraordinary convocation, is now the regular method of its composition. The Peers' Report acknowledges that this change had been tacitly effected, that in Rotuli 1 Edward III. all spiritual and temporal lords were already regarded as the natural constituents of this court; but that the time when this change came about could not be exactly determined (Report, v. 296, iv. 376). Only in this sense the assurance was given in 4 Edward III. that parliaments should be holden annually, or more frequently if necessary (Peers' Report, i. 302); for neither the Lords nor the Commons were interested in a frequent convocation of tax-imposing assemblies.

(*b*) Impeachments of members of the Parliament itself. From the moment that the great council had attained a certain stability, the demand was raised to recognize it as the *judicium parium* of its own members. The demand for a special *judicium parium* for the Crown vassals had hitherto, merely on account of the unequal position of the hundreds of lesser vassals, never taken a definite form. Now, since an organized body and an external limitation existed, the demand for a court of peers for this narrow circle had become practicable and unavoidable. It had been to a certain extent prepared by that ordinance of Henry III. which had exempted the great barons from the ordinary suit of court in the county court. It appeared the more justifiable in proportion as the great council began to invite the justiciaries of the central courts to act as deliberating members at the meetings for delivering its legal decisions. It was natural that the lords should object to recognize their assistants of the legal profession as a *judicium parium* over their own persons. The new expression, "*piers de la terre*," occurs for the first time as an official term, in the judgment passed on the De Spencers in 15 Edward II.: "Accordingly we peers of the land, earls, and barons in the presence of the King do declare that," etc. In the proceedings against Mortimer, and in the disputes with Archbishop John of Canterbury, the demand is still more definitely marked. In 15 Edward III. it was raised, upon the motion of the barons, to a statute, to the following extent, "that no peer of the land should be condemned to the loss of his temporal possessions or to arrest or imprisonment unless by verdict of his peers in Parliament." (*a*)

(*a*) A hundred years earlier, when, in the action against the Earl Marshal, the claim for a court of peers was raised, Bishop Peter de Roches declared that there were no peers in England of the same kind as those in France, and that the King, by means of his judges, had a perfect right to sit in judgment upon his foes. But after the spiritual and temporal lords had for a whole generation year by year appeared at these judicial assemblies, it was natural that they should begin to be regarded as a more select peerage, as "*piers de la terre*." The claim for such a peers' court for the members of the great council was moreover based on the old privileges of office of the Norman period, which had always accorded to the members of the higher courts an extraordinary and separate right of appearing before their own judicial

(*c*) Next follow accusations against the royal great officers, which with due regard to the depositaries of power and law, could not be sent for trial before justices, as being mere advisers of the royal council. They are sent as extraordinary *placita* to the "King in council," which latter for these cases could only be "the great council." This course, in addition to imparting to them a just importance, certainly in early times indicates the mark of violent party passion. With the increasing power of the great constitutional body of the realm, this jurisdiction extended into all three directions; and whilst retaining the forms of a council, became the extraordinary supreme tribunal of the realm. (1[b])

2. The same body is at the same time a tax-granting assembly for the *scutagia* and the extraordinary *auxilia* of the Crown vassals. It had been firmly established by the precedents under Henry III., that the baronage granted these taxes through a committee of notable prelates and barons, who being convoked by royal writ as greater taxpayers represented the mass of the lesser. Edward I. respected this

department, exchequer, etc. In 15 Edward III. the barons bring in an emphatic motion in respect hereof, and on the opinion of a specially appointed commission of four bishops, four earls, and four barons, together with the *sages de la ley*, a statute was issued in the same session to the effect that "no peer of the realm, crown officer or other should be arraigned on account of his office, condemned to the loss of his temporal possessions, thrown into prison or arrest, tried or judged, except by the award of his peers in Parliament" (Peers' Report, i. 314, 315).

(1[b]) But in this question indefiniteness as to limits was and remained the heritage left by the Norman *Curia Regis*. In Mortimer's case (3 Edw. III.) the magnates protest that they are not bound to sit in judgment upon Simon de Beresford, because he is not their peer. On the other hand, they caused Thomas de Berkeley, a Crown vassal who had been summoned by writ, in accordance with custom, to be condemned by a jury of "*milites coram rege in pleno parliamento*" (cf. Reports, i. 300). The uncertainty, too, of the forms of procedure, derived from the Norman judicial commissions, lasts for a long while. In 11 Richard II. 5, lords appellant move articles of impeachment for high treason (for these incidents, see Parl. Hist., i. 410–440). In recollection of the forms of the old administration of justice, the court is styled "council" (Peers' Report, App. iv. 729) and their verdict "award," which only becomes final by the assent of the King. After the opposition had taken the helm, the commons on their side in 21 Richard II. impeach the archbishop, Thomas Arundel, of high treason, who by "award" in Parliament was condemned to banishment. Other peers were accused by the lords appellant, and condemned to death and banishment. The older resolutions of 11 Richard II. were for the most part annulled; in 1 Henry IV. the last resolutions were declared null and void, and the former ones (11 Richard II.) revived.

right of the vassals. But a deeply felt violation of it in the twenty-fifth year of his reign, with the refusal of the clergy to pay taxes, combined with war, financial distress, and discontent in the country, compelled him in the *confirmatio chartarum* (25 Edw. I. c. 6), to agree to a still wider concession, which, as a principle, restricts the grant of all *auxilia*, *scutagia*, and *tallagia* to the common consent of the prelates, barons, and commons in Parliament assembled (cap. 25). Under each subsequent reign this concession was confirmed, extended, and protected against violations. This periodical right of granting taxes gives the great council an unassailable position, and a continual support to its other claims; but this right had to be early shared with the representatives of the communities, which from this point were gradually gaining a preponderance. (2)

3. The *Magnum Concilium* is the supreme deliberative council of the realm for the most important measures of the Government. Primarily for decrees of war and peace, on account of the important military rank of the great barons; but just as much for internal affairs also. Its functions are thus far the same in principle as those of the continual council (p. 399). Naturally the most important were reserved for the great assembly; but on that very account the least important were not excluded. For these indefinite functions the assembly pre-eminently bears the name of "*concilium*," and not of "parliament." But the regular recurrence of the assembly gave the magnates an ever-increasing influence upon the Government in the following principal points.

First of all a participation in the current business of investigating and replying to petitions. As the convocation of the parliaments was marked by the presentation of the greatest number of petitions, it was natural to claim for the

(2) In the straits of war in 25 Edward I. the raising of an aid from all landowners of the value of £20 for the campaign in Flanders was ordered by the ordinance of the King in the council (Peers' Report, i. 220, 221). The universal opposition to it now led to the *statutum de tallagio non concedendo* (25 Edw. III. c. 5, 6), the origin of which is mentioned below, Chap. xxv. sec. 1.

referees (receivers and triers of petitions) that they should be appointed from among the estates themselves. In the stormy time of the "Ordinances of Ordainers" (5 Edw. II.) this claim was established; yet the procedure in respect of it varies according to the spirit of the Government. In 14 Edward III. 1, c. 5, it was decreed, that from thenceforth there should be chosen in every parliament one prelate, two earls, and two barons, invested with the royal commission and authority to hear on petition all complaints of delay or violations of justice, and to bring before the next Parliament all difficult cases suitable to be heard there. This is a kind of perpetual committee of Parliament, like that still existing in the Upper House. As late as the middle of Edward the Third's reign, chancery clerks, royal justices, and peers are arranged together as triers and auditors, the first as reporters, and the latter only for the purpose of preliminary inquiry.

Further, the council acquired an influence upon the appointment to the great offices. In quite early times the King declares his willingness to appoint such persons as are "agreeable" to the great council, yet with the reservation of his right of appointment (Rot. Parl., iii. 258, 349). Frequently, too, the great officers are sworn into the great council. Influential and skilled members of the great council acquire in this position a natural claim to a summons to the administrative council, which under the circumstances could hardly be refused. During the minority of the king, the *Magnum Concilium* naturally exercises a paramount influence upon the formation of the executive council, as at the accession of Edward III., Richard II., and Henry VI. But also under a sovereign who actually ruled, in constitutional conflicts the magnates frequently force the ruling council of the realm upon the King. For instance, in 9 Edward III. the Earl of Lancaster, as president of the council, undertakes the government with the promise on oath that he will conduct no national affairs without the advice of the council, and that every member of the council who gives advice which is prejudicial to the realm shall be removed in the ensuing Parliament. In

12 Edward II. it was resolved that the King should have two bishops, one earl, one baron, and a baron or banneret of the Earl of Lancaster, as coadjutors, and all that could be done without Parliament should be decided with their consent, and all that was done without this consent was to be regarded as null and void, and set right by resolution of the peers in Parliament. The great party struggles after Henry VI. end in periodical appointments, depositions, and condemnations of the executive members of the Continual Council by the *Magnum Concilium*. Under the house of Lancaster the greater part of the executive council of the realm consists of members who owe their position to the high estimation in which they are held in the great council. (3)

(4) The *Magnum Concilium* becomes in this manner the law-giving assembly of the realm. The statute of Marlebridge at the close of Henry the Third's reign formed the most important precedent for the regular deliberation of the

(3) As a deliberative assembly of the King, the *concilium* of the magnates has the same indefinite powers as the executive Continual Council. All national affairs were, under certain circumstances, settled with their advice as the circumstances of the realm and the monarchy demanded. There appear here the same occasional encroachments and rebuffs as in the provincial diets of the German states. As early as 4 Edward I. "prelates, earls, barons, and others of the King's council, justices, and *regis fideles* in Parliament" resolve on war against Wales. In the course of the later wars, and in the disputes with the papal *curia*, they were very frequently asked for their consent. Where petitions were to be considered, they were summoned in cases where a legislative act or a special procedure was needed for the purpose of redress, whilst those which were to be discharged in the ordinary course of law and administration, only came before the chancellor, judges, and council (Peers' Report, i. 245). From this point of view the great council participates also in the delegations. The extraordinary civil and criminal jurisdiction of the council was repeatedly favoured by the *Magnum Concilium*, but with the modifying circumstance that the lords frequently came into conflict with the permanent council as to their participation in it. In an address of the discontented magnates in 10 Richard II., it is expressed that "the King should assemble the lords, nobles, and commons once in each year in his Parliament, as being the highest *curia* of the realm, in which all equity should shine as clear as the sun; and in which both poor and rich should find a never-failing shield and protection by the restoration of peace and quietness, and the removal of every kind of wrong." In 21 Richard II., on motion of the commons, a committee of twelve lords was appointed to try, answer, and despatch various petitions and matters which needed to be discharged after the close of Parliament. It was the arbitrary acts of this committee that brought about the fall of the King (Parl. Hist., i. 482–498). Under Henry VI. an anomalous epoch of revolutionary excesses begins.

King with his magnates on important and extensive acts of legislation, and one which follows close on former isolated precedents. Without renouncing his traditional right of ordaining, Edward I. had, at the beginning of his reign, introduced a deliberation with his *Magnum Concilium* upon all important laws which involved a change in civil and criminal, as well as in judicial procedure. From the statute of Westminster 1, until late in the reign of Edward III., the great council is the ordinary body for the discussion of laws, with reservation of the occasional ordinances of the King in council, which, after the end of Edward the Third's reign are no longer sufficient to alter laws which had been passed in full Parliament. This legislative position, which was in harmony with the national and indestructible legal conception of a legislation *consensu meliorum terræ* (above, p. 97), naturally fell to the prelates and barons, so soon as their position as a supreme tribunal and council of the realm and as a tax-granting body had been definitely established. Their predominant influence is also visible in the language of the statutes, in which, since the time of Edward I. and Edward II., the French language, as the tongue of the upper classes, begins to oust the official Latin. After 3 Edward II. a change in the phraseology was introduced, which, under the name of Parliament, meant sometimes the highest *judicial*, and sometimes the *legislative* assembly of the realm. The latter meaning became the leading one under the following reigns. In addition to the great council, Edward I. began to summon representatives of the counties and towns, merchants and others, to such deliberations as affected the narrower sphere of the Commons (cap. 25). This right began to be shared also with the Lower House as the influence of that house in the province of taxation increased. (4)

(4) In 3 Edward I. the statute Westminster 1 was passed "with the consent of the temporal and spiritual lords of the *communitas*," by which phrase, as under Henry III., the whole number of the vassals summoned to the Parliament is meant (Report, i. 173, 174). The most important legislative acts in the following generation were passed with the concurrence of the *Magnum Concilium*, but as yet without the co-operation of the county delegates, and of the towns. For example, in 13 Edward I., the statute Westminster 2, *de*

But in all these four directions there continues, in the course of the period, an ascendency of the *Magnum Concilium* over the executive council of the realm; so that towards the close of the period, the continual council appears occasionally as a committee of the great council. The struggles between the monarchy and the magnates, which were fought out under Henry III. in the barons' war, become now a struggle between council and parliament.

II. **The constitution of the parliament of the magnates** had been roughly sketched out by precedents down to the close of Henry III.'s reign. After Simon de Montfort's parliament had failed, Henry III. had again adopted the customary method of summoning by royal writ his bishops and abbots, his earls and barons, that is to say, a selection of the latter, to the deliberative assembly; and this order of things continued during the century of the three Edwards. The nature of the council continued regularly to affect the selection of the persons that were to be summoned.

To the parliament as a judicial assembly, only spiritual and temporal Crown vassals could be summoned; because otherwise the principle of the *judicium parium* would have been violated.

donis conditionalibus, and the confirmation of Magna Charta, "*habito super hoc cum suo concilio tractatu*" (Report, i. 194). In like manner the form of expression was still retained which called the assembly (even without any summons of Commons) a "*Parliamentum*" (as in 27 Edw. I., Report, i. 237). In 28 Edward I. the statutes, in spite of the presence of the commoners, were only passed with the advice of the great council (Report, i. 238, 239). In 3 Edward II. mention is made of the common consent of all bishops, earls, and barons "*in pleno parliamento*"; in 4 Edward II. the consent in full Parliament is spoken of immediately after the counties and towns have been dismissed (Report, i. 261). In 6 Edward III. the clergy and the commons were dismissed, whilst the prelates and those of the council remained behind for further deliberation (Parry, 97). Later in the same year, after dismissal of the commoners, the prelates and barons remain (Parry 99, 100). However, from this period parliaments without the assistance of the commoners are more rarely held. The assembly in 20 Edward III. (27th March, 1346), was still a *Magnum Concilium* of that kind which, in a marked manner, was called a "convocation" (Peers' Report. App. iv. 557). An assembly of this character is met with also in 27 Edward III., perhaps also in 45 Edward III., and once again in 2 Richard II. (Rot. Parl., iii. 55; Peers' Report, i. 320). Occasionally we still meet with laws which have only been discussed with the justices or the continual council, such as the statute of Acton Burnell, 11 Edward I. (Report, i. 190, 206–208); the statute *de prisonibus*, 23 Edward I. (Report, i. 217); the ordinances for Ireland, and the statute *de prærogativa regis*, 17 Edward II. (Report, i. 286).

To the parliament as a tax-granting assembly for the purposes of the *scutagia*, the *tenentes in capite* were necessarily summoned. But on this mere question of taxation the greater vassals might be regarded as representing the lesser.

Of the parliament as a deliberative assembly, in addition to the smaller council, the ecclesiastical dignitaries were customary members, and the most illustrious Crown vassals, to a certain extent, members by birth. Moreover, since experience in military and political business was here of great moment, there could be no objection to summoning to the council illustrious men without Crown fiefs, and even of foreign family (such as the Beaumonts and Grandisons), as can be proved to have taken place in a few cases. The qualification for a foreigner by grant of an immediate knights' fee was not hard to attain.

Lastly, for the parliament as a legislative assembly, a selection of the most distinguished men (*meliores terræ*) was from time immemorial the rule. But the more that in the course of time, the business and the official staff became consolidated, the more did this consolidation lead to a legal definition of qualification on a well-balanced average, in the same way as all formations of estates of the realm can be ultimately reduced.*

From this point of view three groups, viz: the spiritual lords, the temporal lords, and the members of the council, were summoned to the great council.

The *first group* is formed by the spiritual lords, who according to time-honoured custom take the precedence; archbishops, bishops, abbots, priors, and the heads of the religious orders.

* The qualification for parliament is known with tolerable accuracy from the preservation of the parliamentary writs since 23 Edward I., and from their being printed and elucidated in the great works of Prynne (1659–1664), and Dugdale (1685), and in the Reports on the Dignity of a Peer. The First Report has been, on account of its importance, reprinted at four different times (1819, 1820, 1823, and 1829). In like manner the continuations and completions (vols. ii.–v.) contain exceedingly important matter at the end of the list of lords created. Parry (Parliaments, 52–54) gives a table of the temporal lords. I have given a complete tabulary statement of the number of the prelates, magnates, and members of the permanent council summoned to attend each parliament from 11 Edward I. to 1 Richard II., in the second edition of my "Engl. Verwaltungsrecht" (1867, vol. i. pp. 382–387).

From the first it can here be perceived, that the two archbishops, and nineteen bishops must be regularly summoned in their double character of heads of the Church and great vassals of the Crown. Wherever these summonses are imperfect, it arises from vacancies, or from personal absence or temporary impediments; or the summons is for smaller deliberative assemblies, for which a narrower selection had been made. The number of the abbots appears for a long time to vary, much according to the object of the summons. Many of those summoned deprecate the expensive and burdensome honour, and assert that they are not bound by virtue of their possessions to pay suit of court to the *Curia Regis*. After 15 Edward III. it was acknowledged in a number of precedents that those were to be excused from obeying the summons "who did not hold by barony, but only in frankalmoign." From that time the number of the abbots became more and more definitely fixed at about twenty-five. In consequence of the occasional summons 122 abbots belonging to different monasteries were, however, summoned at one time or another. Still more fluctuating was the summoning of the priors and heads of the three ecclesiastical orders. Of the priors, only a small number were summoned on each occasion, and after 15 Edward III., the non-possession of a Crown fief was recognized as a reasonable excuse. But in consequence of frequent variations, forty-one priors were summoned, of whom only two can be regarded as regular attendants. (1)

(1) The prelates who were summoned comprise first of all the archbishops and bishops. Where the question is one of the grant of aids, the summons is as complete as possible, and during the vacancy in a see, the representative in the spiritual office (*i.e.* the Keeper of the Spiritualities) was called upon. Occasionally the Archbishop of Dublin was also summoned. The number of the abbots appears to have been gradually fixed at about twenty-three or twenty-five; only where the granting of a subsidy or a crusade or the like, was to be debated, a greater number was periodically summoned. In 15 Edward III., two abbots and two priors were excused from attendance, because they did not hold by barony, nor anything whatever *in capite*, for which they would have been bound to come to the parliaments and councils (Parry, 112). In the same year several others also were excused from appearance, because they only held in frankalmoign (Parry, 113). (A case of this kind occurs as early as 12 Edw. II.). This appears from that time to be treated as an established reason for being excused.

The *second group* (the temporal lords) embraces, in the century of the three Edwards, the earls and the barons. The earls are still the acknowledged heads of the Crown vassaldom, although their dignity is only based upon patent, and not upon the feudal possession of a county. The small number of lords thus characterized appears to have been regularly summoned from the first nearly in the same way as the bishops, so that the omission of any can be explained by minority, absence, or personal hindrance. In later times there is added to these the very small number of dukes, marquises and viscounts, of like character, appointed by patent. On the other hand, the leading principle for the summons of the barons is very hard to determine. The customary method under Henry III. (according to the origin of all *concilia optimatum*), consisted in the King's inviting the most illustrious and the greatest feudatories to represent all the rest in the law-court, the council, and the tax-granting assembly. This point of view still left a wide open field. For instance, Edward I. summons to an assembly of the realm at Shrewsbury in 1283, 110 earls and barons, whilst to Westminster in 1295, only 49. The citations under Edward I. vary between 40 and 111; under Edward II., between 38 and 123; under Edward III., between 24 and 96; under Richard II., between 29 and 48; under Henry IV., between 24 and 37; under Henry V., between 20 and 32; under Henry VI., between 15 and 42; and under Edward IV., between 23 and 37. In the first century of the period the change is so frequent, that 98 lords were summoned on one occasion only; and 50 lords only two, three, and four times, without their names ever occurring again. Others were summoned in their

Still more indefinite are the summonses addressed to the priors and heads of the orders. The latter disappear owing to the abolition of the ecclesiastical orders and for other reasons, so that at last only a fixed number of two priors remained. In the first century of this epoch the writs of summons for the most part required appearance in person or by proxy. The abbots particularly were excused, when grants of taxes were to be made, in the event of their sending a procurator (Parry, 68). But sometimes the sending of proxies is expressly forbidden, as in 6 Edward III.; and in the course of the period the demand of appearance in person at the deliberative assembly becomes more and more strict.

own lives, but their descendants were never summoned. Great prominence being given to the grant of taxes, weight was certainly laid upon financial considerations, and such Crown vassals only were at first regarded as paid the great *relevium* of a hundred marks on change of possession. Further, a regard to the hereditary great offices was decidedly necessary, although the high constable and the earl marshal were only specially summoned as such after 51 Edward III. Unmistakable regard was also paid to certain great families. According to the purpose and place of summons, and according to personal confidence, there could be summoned round a fixed and determinate nucleus of about thirty barons, a number two or three times as great; and in the whole course of the Middle Ages there occurs not a single case in which the barons have refused a place among them to any one thus summoned. But the possession of a great Crown fief, with all its inherent importance with regard to military service, taxation, sub-vassals, and authority in the county, was necessarily to be considered in the summons, so far as the King was interested in having the mouthpieces of the Crown vassals in his council. Husbands of heiresses were generally summoned; owners of parcels of land, where a partition had taken place, were sometimes summoned and sometimes passed over. Beyond these considerations the century of the three Edwards never advanced. (2)

(2) The group of the temporal lords comprises in the first century only the earls and the barons. Under Edward III. the dignity of a duke was first created for the princes of the royal house, and after 24 Edward III., it became customary to place such a duke of royal blood, or the Prince of Wales, at the head of the persons summoned. After 10 Richard II. there are frequently added to these one or two marquises; after 23 Henry VI. also one viscount; in 31 Henry VI. three viscounts. The difficulty lies only in the number of the so-called barons. The Crown vassaldom was at all times unequally composed of great lords, simple landowners, and owners of small parcels. Instead of the impracticable universal summons, and the equally impracticable election, there remained accordingly only the royal selection by writ. To the stormy national assembly in 49 Hen. III. Simon de Montfort had only summoned his adherents, five powerful earls, and eighteen barons, among them probably many lesser ones (Peers' Report, iii. 106, *seq.*). After the restoration of the royal authority, Henry III. naturally summoned a meeting of his faithful followers. This event has been rightly described by an old historian, whom Coke cites from Camden, "*Statuit et ordinavit, quod omnes illi comites et barones Angliæ, quibus ipse rex dignatus est brevia*

The *third group* of the *Magnum Concilium* was formed by the members of the council. Not only the oldest modes of summoning, and the object with which a deliberative assembly was holden, but also certain recorded events prove that originally the executive members of the council voted in Parliament as such. In 20 Edward I. the *Rotuli* prove that under the *Concilium Procerum et Magnatum*, the chancellor, the justiciaries and the higher officials of the council, as such, are included (Peers' Report, i. 206–208). Even for the grant of taxes and the *judicium parium*, the right of voting in this capacity could not well be denied to the lowest Crown vassal. But just as unmistakably the united influence of the great prelates and lords in the great assembly soon asserted its ascendency over the mere bureaucratic element. The first shock to the position of the mere officials had been given by the Statutes of Ordainers (5 Edw. II.). But the more decisively the idea of a "peerage" among the lords who were summoned came into prominence, and in 15 Edward III. attained a legal recognition, the more usual it became

summonitionis dirigere, venirent ad Parliamentum, et non alii, nisi forte Dominus Rex alia brevia eis dirigere voluisset." But it is wrong to regard this as a new statute; it is only the description of the original condition of things (Peers' Report, i. 395; iii. 114). And so it continues in the century of the three Edwards. Without reckoning anomalous smaller deliberative assemblies, the number of summonses under Edward I., II., and III., varies between 24 and 123. We cannot, therefore, doubt that the summons by writ in this century carried no hereditary right to a seat (Peers' Report, i. 325, 326; iii. 117, 265). But the difficult question remains still unsolved as to what other principles the procedure acted upon. Martial efficiency alone cannot have been decisive; and just as little did legal distinctions exist in feudal tenure. With regard to the grants of taxes, and the frequent mention of tenure "by barony" among the abbots, it appears probable that the financial point of view was predominant; that is, a special regard was had to "baronies," which, according to the rating of the Exchequer, pay the great *relevium* of a hundred marks. It seems that in the century of the three Edwards a body of about thirty barons became fixed as an average number, with the reservation (1) that the tenure by barony did not as yet give a legal title to a summons, and (2) that on the other hand lesser tenants could be also summoned out of personal confidence, and occasionally even such as did not hold any fief of the Crown. As a rule the writs of summons insist upon a personal appearance; but the temporal lords were for a still longer time allowed proxies, particularly to represent them at acts of taxation. In 35 and 36 Edward III., two anomalous assemblies occur, to which seven countesses and three baronesses were summoned, with the demand made upon them to let themselves be represented by "trusty men." The question here, which at all events was expressly mentioned in the latter year, was the special one of furnishing armed men for the campaign in Ireland.

to summon the prelates and the great feudatories, who belonged at the time to the council of the realm, in the ranks of the other peers, because this had begun to signify both politically and socially a higher position. The membership of the council becomes gradually absorbed by the members of the great council, who now understood their position as forming a unity. Accordingly as members of the council the chief justices, the justices, and the councillors of the second and third rank were now only summoned by special writ. The justices in most cases appear merely as the assistants of the lords. With regard to taxation and the jurisdiction of peers the fusion of the peers in council and the peers in Parliament appears perfected; it is quite different, however, as to the deliberative and legislative assembly, in which the continual council, being still a *concilium in concilio*, forms, as Hale calls it, the administrative body under the personal direction of the King. The subjects of deliberation were prepared in the smaller council; the proceedings conducted by officers of the council; all *conclusa* recorded by officers of the council; all decrees resolved subsequently *discussed* in the council (until Henry VI.); all sittings took place in the council chambers of the royal palace, and the servants were ordered to attend from the royal household, as is the rule to this day. The regular sittings of the permanent council were only periodically interrupted by these plenary assemblies of the estates of the realm "*ad ardua negotia*." The convocation of the notables for this purpose may (according to Palgrave's appropriate expression) be called the *terms* of the council, corresponding to the terms of the courts of law. That the great council under Edward I. appeared thus to its contemporaries, is proved by the words of Fleta (ii. 2), which coordinate it with other departments or *curiæ*, as "*Curia Regis in Parliamento*." (3)

(3) In its original position the executive council is an integral element of Parliament. In harmony with the Peers' Report, Parry (Parliaments, 116) remarks upon 18 Edward III.: "The council seems always to have been present in Parliament, and every important act of the King in Parliament appears to have been sanctioned by the advice of his council. The meetings of

III. **The development of the heritability of the temporal peerage** from these conditions becomes gradually discernible in a few symptoms, under the dynasty of the house of Lancaster. Here internal causes were at work, which in every process of political formation take an outward shape when the substance is already finished. It was the personal importance of the great lords for the State which silently decided this question. For the military service of the State a great vassal with his warlike followers was of quite as much importance as a small county, and this importance became greater owing to the French and Scotch wars. For taxation the baronies, which paid the great *relevium* of a hundred marks, and £100, connected as they were with periodical subsidies, profitable wardship, and incidental feudal dues, had as much weight as a small county, and more than that of the majority of the small market towns, which were already summoned to send burgesses to Parliament. In war as in the council, the great lords are personally a prominent element, which is more and more firmly established by their meeting together in person to discuss the "*ardua negotia regni.*" This annual meeting, this customary discussion of the great business of the State gives them that experience, that importance, and those qualities which engender the justifiable feeling of a birth-membership, which at the same time has its root in their local position.

Parliament were still considered as meetings of the King's select council, at which the lords and commons as the great council of the King, for legislative purposes, and for granting aids, and for their advice on extraordinary occasions, were summoned to attend" (cf. Report, i. 317). The statements respecting the members of the council who were summoned are, however, for the most part exceedingly indefinite, so much so that the higher, middle, and lower officers are confused together. In 23 Edward I. the justices of both benches, the itinerant justices, the barons of the Exchequer and "others from the council" are mentioned; in 1 Edward II. thirty justices and others of the council; in 2 Edward II., "thirty-five of the council;" again in 2 Edward II., sixteen justices *et ministri;* in 3 Edward II., seven of the council and others; in 6 Edward II., sixteen justices and sixteen clerks of council: again in 6 Edward II., "forty-two of the council;" in 14 Edward II., "thirty-two judges and of the council." The justices, masters, and clerks of the council were often expressly mentioned; after Edward III. very frequently a number of King's serjeants (Foss, iii. 370). Whilst the writs of summons addressed to the magnates run "*cum cæteris paelatis tractaturi,*" those addressed to the justices leave out "*cæteris,*" and thus express that the officers, as such, do not stand upon an equality with the peers.

With the development of the county militia, they became also the skilled leaders of the national array. With the institution of justices of the peace, after 34 Edward III., they took the head of the police control, and the quarter sessions, that is to say, of a great portion of the criminal justice and internal administration of the country. Their eminent personal influence in the neighbourhood of their residence and their estates, is increased by their prominent position as the greatest tax-payers wherever land-tax, income-tax, county-tax, and local-tax was to be paid. Their local influence reflected upon their position in the great council, and their position in the council upon their local influence. The aggregate of such conditions becomes at all times bound up with tenure. According to the common law succession, the whole of these customary duties and this customary position pass to the eldest son or other heir, and only to him. The right of the kings to summon by their writs those whom they choose out of hundreds, could no longer ignore such claims. The feeling of the equality of this position had already become so strongly developed in the party struggles under Edward II., that the statute 15 Edward III. formally acknowledges those summoned by writ as "*pares regni*," and thus legally severs them from the great number of the other *tenentes in capite*. The distinction that subsisted between the greater and the lesser vassals in army, law-court, administration and taxation, at length, after a struggle that had lasted for centuries, attained legal recognition. The house of Lancaster was now enabled primarily to support its usurped throne upon the recognition of the body so constituted. The legality of the present political government was established by the mutual recognition of King, Lords, and Commons; and if this recognition was to mean anything, it had to proceed from a body constituted according to old custom, and not from an arbitrarily summoned number of partisans. The council of the prelates and barons accordingly from that time attained a fixed form; the number of those summoned became smaller and more constant in its attendance, and the element of the new members who were

summoned merely out of personal confidence becomes reduced. Frequent deliberations upon military matters as well as military merits had also caused a number of "bannerets" to be summoned; but for these new members also, the writs of summons are more and more regularly issued. Although the royal right of personal summons is never given up, yet it silently assumes the shape of a permanent attribute of a permanent body.* The question was simply one of giving legal form to what had been accomplished *de facto*.

But this legal form could not be deduced from the mode of enfeoffment by the crown and the writs of summons hitherto in vogue. The summons by writ could not, being a single act of invitation, express or found a permanent right. Just as little could the peerage be attached to fixed and determined estates, for then every lesser Crown vassal might have raised like pretensions, and every purchaser and new acquirer of such an estate would, by virtue of the alienability of the English fiefs, have been able to lay claim to a peerage, and the royal right of summons would have been materially restricted. In every respect this was not intended. The development to which the State had attained had gone beyond the idea of the older feudalism, which under Stephen had combined the *Constabularia* and the *Marescalcia Angliæ* with certain estates. The suppression of manorial jurisdiction over independent estates, and the legal equality of the common law for all classes, rendered such a relapse impossible. The new legal form in which an hereditary estate of the realm and nobility by birth could attain recognition, was only that of a royal patent or a charter. After the Conquest the sole higher title of nobility, that of the earl, was based upon patent; from Edward III. downwards, a ducal dignity was also created by patent; from Richard II. that of a marquis. The dignities which were conferred after 10 Edward III. upon princes of the blood royal, were creations of a purely personal character, as princes of the royal family did not hold any fiefs whatever of the Crown. The precedence

* Cf. *infra*, the note to this chapter.

of the royal house and the higher dignities could not possibly be disputed by the lower ranks of the peerage. According to the principle of this title of nobility, in 11 Richard II. John de Beauchamp of Holt, Crown vassal of the knight's fee of Kidderminster, was appointed in consideration of his services and noble descent, Lord Beauchamp, Baron of Kidderminster, in hereditary possession for himself and the heirs male of his body, with all the rights, etc., of a baron. Since during the hundred years preceding this, certain barons, to the exclusion of the rest, had been summoned to Parliament, nothing else could be meant by the newly conferred "rights" than primarily such a summons. The title "*Baro*" being thus recognized as an hereditary title of nobility, its claim like that of other titles of nobility to a summons to Parliament was legally acknowledged. Much as this first creation was opposed to the wishes of the magnates, yet it finally was decisive as to the legal rank of the peerage. The Crown vassals who had been hitherto summoned by writ, came thus into a new position. Now that the newly "baronized" favourites claimed to be an hereditary estate of the realm, a similar claim could not be denied to those older and more illustrious barons who were ordinarily summoned to attend. The style of "baron" became accordingly a legally recognized title of nobility for barons of the realm. There existed in the fifteenth century two modes of summoning to the peerage: (1) by patent, for dukes, marquises, earls, viscounts and patented barons, legally recognized as hereditary by patent: and from the middle of Henry VI.'s reign to the present time this method has become more and more the usual one; (2) by writ for unpatented barons "by custom." This title by custom was in the fifteenth century hereditary for the older and more eminent, but not for others. Mere personal summonses became rare even under the house of Lancaster; under the Tudors, they entirely ceased; and under Elizabeth the courts interpreted a summons by writ to be hereditary, "by virtue of custom." In harmony with the character of a personal nobility, in 20 Henry VI. the right of the peers to be judged by the Upper

House was also extended to their wives, and widows; but beyond this it did not go. Thus took place the most difficult birth of any hereditary nobility in the European world; but it was a most well-earned, and therefore a durable nobility.

NOTE TO CHAPTER XXIV. — *The origin of the heritability of the temporal peerage* is the subject of a long-standing dispute, perpetually renewed, because in the process of building up the State the result took a form decided by the reciprocal and active influence of numerous factors, whilst jurisprudence, heraldry, and the political and social party views of the State only take cognizance of the individual and external elements of the phenomenon. The Peers' Report rightly regards the recognition of a legal peerage as the first step towards the formation of an hereditary national nobility, beginning with the judgment against the De Spensers in 15 Edward II., in which, however, none of the bishops took part, a circumstance which was afterwards used, with other reasons, for declaring the sentence null and void (Parry, 85). In the same way, in 4 Edward III. the earls and barons, as peers of the realm, tried Mortimer and his accomplice. At the same time the protest is made that they were not bound to sit in judgment upon "others than their equals." Whilst Magna Charta recognizes a *judicium parium* only in the sense of a judicial fellowship (in which sense John granted even the Jews a *judicium parium*), there now springs into life the new claim of the "*pares terræ*;" that is, of a fellowship of rank different from the *pares* of the county. This is legally recognized in 15 Edward III., the decisive act by which the barons of Parliament separate themselves from the other *tenentes in capite*, as a nobility of the realm. This class privilege extends also to the time during which no Parliament is sitting, and later even to women and widows. The Peers' Report (i. 313, 314) acknowledges the importance of this act to its fullest extent. A further weight is laid by the Report upon the rules of precedence as laid down in 5 Richard II. c. 4, by which temporal and spiritual lords are legally mentioned as a class distinct from the knights. More decisive was the succession of the house of Lancaster, the legal title to which depended upon the recognition of this body. Under Henry IV., in the action against the Earl of Huntingdon, a further formal concession was made when the King deputed the Lord High Steward as his representative to hold the Peers court, and thus introduced a piece of the ceremonial of a feudal *cour de baronie*. Accordingly, the number of the Upper House under the Lancastrians became more uniformly fixed, and owing to its limitation to the most distinguished members, smaller, in harmony with the tendency of a favoured class. In noticing the very small number summoned in this period, we must remember that many were often absent in foreign wars. The martial tendency of this era introduced into the writ of summons the titles appertaining to the feudal array. In 51 Edward III., and in 2–5 Richard II., besides the barons, one or more *chivalers* are spoken of. The style of *sieur* is more rare. Under Henry VI. a new form of expression begins to be employed. In 3 Henry VI. the nineteen barons summoned to Parliament were described as seventeen *chivalers*, one *miles*, one *magister*. From 6–9 Henry VI. all barons are styled *chivalers;* in 18 Henry VI. twenty-three *chivalers*, Baron de Greystock "and others" were summoned; in 27 Henry VI. twenty-five *barons chivalers*, nine *barons milites*, four *barons domini de*. This distinction between *chivalers*, *milites*, *armigeri*, and *domini*, continues until the close of this reign, and under that of Edward IV. The legal and practical equality of the temporal barons accordingly did not exclude degrees in their military rank; and it was only by very slow degrees that the title of "baron," like that of

earl, marquis, etc., became an established title of nobility in the modern sense of the term. The title "lord," on the other hand, does not designate a dignity created by the Crown, but is only a title of courtesy for numerous other offices and dignities. In general the concession of a peers' court, according to the spirit of the royal prerogatives, does not as yet exclude the arraignment of peers in extraordinary cases by justices with a jury, without the legality of the proceedings being called in question. Against the nobles, too, the continuance of a personal right residing in the King to constitute a court in extraordinary cases was still asserted. This was done most frequently in case of the prelates. In 25 Edward III. the Primate in the name of the clergy presents a petition to the effect that since the archbishops and bishops hold their temporalities of the King *in capite*, they are so far "*piers de la terre*," in the same way as other earls and barons. But this spiritual peerage did not arrive at full maturity, for the clergy laid claim to the far more valuable right of a special ecclesiastical jurisdiction, and claimed the far more extensive privilege of clergy, having almost completely severed themselves from the temporal constitution.

The legal form for the heritability of the temporal peerage is creation by patent or charter, which definitely declares the heritability of the dignity. The "creation" of new barons can only date from such a grant; for the "summons" by writ to each separate session had not in itself the character of a "dignity" conferred. The arbitrary modern expression which speaks of a creation of peers by writ, is only a source of confusion and dispute. But it is remarkable that for a length of time the higher creations by patent were proclaimed "in Parliament." In 6 Edward III. the Prince of Wales was appointed Duke of Cornwall, and in like manner six new earls in 6 Edward III., "by common assent and council of the prelates, earls, barons, and others of our council in Parliament." The question here was not of the granting of new fiefs, but of personal dignities; thus we find in 36 Edward III. a prince of the blood created Duke of Clarence, though such a dukedom had never existed (Rep., i. 326). Various acts of this sort occur between the years 1337–1414, and the later jurisprudence asserted that such an appointment was to be regarded as proceeding from the "whole legislature," without perceiving that if this had been the case the peerage would have become an exclusive guild. But the proclamation of solemn acts of the feudal lord in the "cour de baronie" was an old feudal custom, and the so-called "consent" to them is a remnant of the acclamation of the bystanders in the popular court, which in no case was a condition of the validity of the transaction. Hence can be sufficiently explained that it was the creation of the highest dignities which took place in Parliament, and that occasionally other lords were created out of Parliament without mention being made of "consent," and that this form subsequently fell again into disuse. Concise discussions on this point are contained in Sir Harry Nicolas' "Report on proceedings on the Earldom of Devon" (App. ix.). The later procedure proves that the kings did not allow their right of free appointment to be in any wise limited by a right of Parliament to "consent." The patent of appointment defines at the same time the manner in which the dignity shall descend, which is sometimes framed narrowly, and sometimes extended to embrace all the legal heirs of the body. Upon this are based the variations of heritability which remain to the present day. But after heritability by patent was made the rule, and the number of the new "barons by patent" increased from generation to generation, it was impossible, having regard to the legal equality of the peerage, to put the original stock in a lower position than the new. The older members who were continuously summoned could now claim an hereditary right by writ, "by prescription," as was also assumed by the Peers' Report (i. 342), with the very just remark that the newer creation "by patent" could not possibly have appeared as the better and more advantageous method, if there had ever existed a peerage by virtue of the tenure of certain estates,

i.e. a barony by tenure (Rep., iii. 119).

It was not until the power of nobility had made progress under the house of Lancaster, that this old feudal conception comes so far into prominence that in 11 Henry VI. the earldom of Arundel was directly claimed and recognized as a "barony by tenure;" so that the habit arose of assuming the existence of a mode of tenure "by service of attending the legislative assemblies," which, with all the deductions made therefrom is historically and legally erroneous (Peerage Report, iv. 269, 270). The seats of the lords in Parliament were based upon custom within this body, and formed so far a special corporate customary law or law of Parliament. In 11 Richard II. the ecclesiastical and temporal peers accordingly claim "as their liberty and franchise that all cases of high nature, concerning the lords of Parliament, should be awarded in Parliament. For that the realm of England never was or shall be ruled by the civil law; nor was it their intent that a case of so high a nature as this appeal should be tried by the course, process, or order used in inferior courts," and this claim was willingly acknowledged by the King, but did not succeed in establishing any deviation from the principles of the common law. Accordingly the justices in 7 Henry IV. made a distinction between the right to the name and title of a peerage, and the right to a seat in Parliament. The latter they urged was an exclusive question for the King and the peers; the former, on the contrary (being a private claim of family right) was a common law point, and belonged to the jurisdiction of the ordinary courts of law (Nicolas, "Proceedings," iii. 57, *seq.*). But as to the peers who were summoned by writ, the practice of Parliament accepted the important limitation, that the writ certainly did not confer an hereditary peerage and an hereditary nobility, where the individual thus summoned had not really taken his seat by virtue of the writ—a maxim which was finally established in the case of Edward Nevill, in 8 James I. The appointment by patent was in other directions expressly and repeatedly recognized by the tribunals as a personal dignity, apart from any real connection with any definite landed estate, and it was particularly declared by Lord Justice Holt that this barony by patent forms "a title of dignity and parcel of the name." The long list of the later peers was created by patent, and the mere summons by writ has long since fallen into disuse, except for a special case. In 22 Edward I. for the first time the custom is met with of summoning to Parliament the son of a duke, a marquis, or an earl, out of courtesy, even in his father's lifetime, under the title of a second barony, which the father holds either really or nominally; and this custom has been observed down to the present day. The summoning of the son in addition to the father was only regarded as a personal *ad interim* measure; such a peerage is merged in the principal peerage, when the succession arises, and thus creates no hereditary dignity.

The still continuing dispute as to whether the English peerage was not originally a barony by tenure, arose from social ideas. All classes of society wish, not to acquire their political rights, but to enjoy them by virtue of tenure, and by inherent right. Hence the social conception always kept recurring to the favourite idea of an estate of the realm based merely upon possession; whilst the English peerage is not built upon the bare possession of privileged estates, but upon personal summons to the council of the realm, summons which only became by custom hereditary in a direct ratio to the customary performances entailed upon the tenants of great estates. The favourite social ideas which are in constant conflict with this fact, even in the Middle Ages, gave rise to a work entitled, "*Modus tenendi Parliamentum*," which according to one manuscript is intended to be an exposition of "How William the Conqueror adopted the mode of summoning Parliament from Edward the Confessor." The tenant of thirteen and one-third knights' fees is, according to this document, able to claim a right of summons to Parliament as a baron; that is, a recognition as belonging to an estate of the realm; and the tenant of twenty knights' fees as an earl,—an opinion which is apparently based upon

a mere calculation of the amount of the *relevia*. Sir Edward Coke seriously regarded this manuscript as a genuine legal authority, and modern investigations endeavour to prove a higher antiquity for it by placing it as far back as Edward I. In that case it would only prove that even in those days feudalism was a favourite hobby. Its positive statements were almost in accordance with the condition of the Parliament in the fourteenth century, which the author endeavours as far as possible to refer to custom of time out of mind (Select Charters, 502). But it is not necessary when examining the many curious descriptions of the "*Modus*," which are at variance with documentary legal history, to think exactly of a feudal Pseudo-Isidor; they are rather similar transformations to those which occur even in our own day in the drawing up of all genealogical trees, and are the conceptions of a herald's office and not of politics and public law. Good remarks on this point are made by Pauli ("Bilder aus der Englischen Vorzeit," 1858, p. 65, *seq.*), together with vivid sketches of the procedure in Parliament.

END OF VOL. I.

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